DOCKET

No. 07-499

Title:	Daniel Girmai Negusie, Petitioner v. Michael B. Mukasey, Attorney General
Docketed:	October 16, 2007
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(06-60193)
Decision Date:	May 15, 2007
Rehearing Denied:	July 17, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~~~
Oct 15 2007	Petition for a writ of certiorari filed. (Response due November 15, 2007)
Nov 7 2007	Order extending time to file response to petition to and including December 17, 2007.
Dec 14 2007	Order further extending time to file response to petition to and including January 16, 2008.
Jan 8 2008	Order further extending time to file response to petition to and including February 15, 2008.
Feb 15 2008	Brief of respondent Michael B. Mukasey, Attorney General in opposition filed.
Feb 27 2008	DISTRIBUTED for Conference of March 14, 2008.
Feb 27 2008	Reply of petitioner Daniel Girmai Negusie filed. (Distributed)
Mar 17 2008	Petition GRANTED.
Apr 8 2008	Record received from U.S.C.A. for the 5th Circuit. (1 envelope)
Apr 17 2008	Administrative record received from the Office of the Solicitor General. (1 accordain folder)
Apr 18 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 2, 2008.
May 28 2008	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including June 16, 2008.
May 28 2008	The time to file respondent's brief on the merits is extended to and including August 15, 2008.
Jun 16 2008	Joint appendix filed.
Jun 16 2008	Brief of petitioner Daniel Girmai Negusie filed.
Jun 16 2008	Brief amici curiae of American Jewish Congress, et al. filed.
Jun 23 2008	Brief amici curiae of Becket Fund for Religious Liberty, et al. filed.
Jun 23 2008	Brief amicus curiae of Advocates for Human Rights filed.
Jun 23 2008	Brief amici curiae of Scholars of International Refugee Law filed.

Jun 23 2008	Brief amicus curiae of Office of the United Nations High Commissioner for Refugees filed.
Jun 23 2008	Brief amici curiae of Human Rights First, et al. filed.
Jul 31 2008	CIRCULATED
Aug 15 2008	Brief of respondent Michael B. Mukasey, Attorney General filed. (Distributed).
Aug 18 2008	SET FOR ARGUMENT ON Wednesday, November 5, 2008.
Sep 15 2008	Reply of petitioner Daniel Girmai Negusie filed. (Distributed)
Nov 5 2008	Argued. For petitioner: Andrew J. Pincus, Washington, D.C. For respondent: Gregory G. Garre, Solicitor General, Department of Justice, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

07-499 OCT 15 2007

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No. (1)

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

PETER D. KEISLER,
ACTING ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A). The question presented is:

Whether this "persecutor exception" prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution.

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OPINION BELOW

The unpublished opinion of the court of appeals (App., *infra*, 1a-3a) is available at 231 Fed. App'x. 325. The opinion of the Board of Immigration Appeals (App., *infra*, 4a-8a) and the opinion of the Immigration Judge (*id.* at 9a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007, and a timely petition for rehearing was denied on July 17, 2007 (App., *infra*, 22a). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1158(b), provides in pertinent part:

   (1) (A) In General – The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. * * *

   (2) (A) In General – Paragraph (1) shall not apply to an alien if the Attorney General determines that (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 241 of the INA, 8 U.S.C. § 1231(b)(3), provides in pertinent part:

   (A) In General – * * * [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or

> freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion
>
> * * *
>
> (B) Exception – Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –
>
> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

This case involves the proper interpretation of the federal statute requiring the denial of asylum and withholding of removal from an asylum-seeker who participates or assists in persecution; in particular, whether that provision categorically excludes from eligibility for such relief any asylum-seeker who has been *forced* by threats of death or torture to assist or participate in persecution. Applying binding circuit precedent, the Fifth Circuit in this case held that coercion is irrelevant to the application of this "persecutor exception." Accordingly, even in situations where (as here) an individual was concededly forced to participate or assist in persecution under threat of bodily violence and death, that individual is ineligible to obtain asylum or withholding of removal.

The view taken by the Fifth Circuit accords with a decision of the Second Circuit and squarely conflicts with a decision of the Eighth Circuit. Decisions of the First and Ninth Circuits on closely-related issues indicate that those courts would reach the same

result as the Eighth Circuit. The fate of asylum-seekers who themselves have been forced by threats of torture or death to take part in persecution thus turns on no more than the location in which they must file their applications for asylum.

In a world where the number of civil wars is increasing, and both sides often coerce individuals into military service, this issue is arising with increasing frequency—as demonstrated by the significant number of judicial decisions addressing it. Capricious variation in the application of this Nation's asylum laws with respect to a frequently-recurring issue cannot be tolerated. This Court should grant review to restore uniformity to the application of the law on the question presented.

A. Statutory Background

Asylum has a "long and sacred history dat[ing] back to the very beginnings of regulated political life." Hanna Arendt, *The Origins of Totalitarianism* 280 (1951). Under the rule of asylum, refugees, persecuted for their political opinions or religious beliefs in their home countries, obtain the protection of the sovereign authority granting it. Asylum and refugee law was modernized as an international institution in the 1951 United Nations Convention Relating to the Status of Refugees, G.A. Res. 429 (V) (1951), and its 1967 Protocol, G.A. Res. 2198 (XXI) (1967).

Prior to 1980, the United States had no general law of asylum. Following the Second World War, for instance, Congress passed piecemeal legislation establishing asylum standards for refugees from particular countries or regions. See, *e.g.*, the Hungarian Refugee Act of 1958, Pub. L. No. 85-559, 72 Stat. 419 (1958); Cuban Refugee Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (1966); Indochinese Refugee Re-

settlement Act of 1977, Pub. L. No. 95-145, 91 Stat. 1223 (1977). The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 110 (1980), was the Nation's first comprehensive legislation relating to asylum.

Under the standards set forth in the Refugee Act, refugees may remain in the United States by obtaining either a grant of asylum or withholding of removal. See INA §§ 208, 241 (codified as amended at 8 U.S.C. §§ 1158, 1231). A grant of asylum "permits an alien to remain in the United States and to apply for permanent residency after one year," while withholding of deportation or removal "only bars deporting an alien to a particular country or countries." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999) (citations omitted). Moreover, "withholding is mandatory unless the Attorney General determines [an] exception[] applies," but "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion." *Ibid.*

In order to receive either type of relief, an alien must be "unable or unwilling to return to * * * [his home] country because of persecution or a well-founded fear of persecution." INA § 101(a)(42), 8 U.S.C. 1101(a)(42). But all aliens who demonstrate a well-founded fear of future persecution are not eligible for asylum or withholding of removal. Congress has excluded from eligibility any alien who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A)(i), 8 U.S.C. §§ 1158(b)(2)(A)(i). See also INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).[1]

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1. As originally enacted in the 1980 statute, the persecutor exceptions to both asylum and withholding of removal used the

Congress enacted this categorical "persecutor exception" from eligibility for asylum as part of the comprehensive revision of asylum standards in the Refugee Act of 1980. The Refugee Act conformed United States asylum standards with the international standards contained in the 1951 United Nations Convention and its 1967 Protocol. See *Aguirre-Aguirre*, 526 U.S. at 426-27 ("'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968." (citations omitted)).[2]

Another "basic objective[]" of the 1980 Act was "to provide protection to all victims of persecution regardless of ideology * * * * [and] to give the United States sufficient flexibility to respond to situations

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same language. In 1996, Congress passed the Illegal Immigration Reform And Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), a comprehensive revision of the Nation's immigration laws. That law amended the INA, moving the persecutor exception relating to the withholding of removal from § 243(b)(3)(B)(i) to § 241(b)(3)(B)(i). In addition, it amended the withholding exception's language, such that it now applies to any asylum-seeker who "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(B)(i). This change in phraseology has no substantive implications for the question presented here.

2. The Protocol was adopted because the Convention "covers only those persons who have become refugees as a result of events occurring before 1 January 1951," and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951." G.A. Res. 2198 (XXI) (1967) (preamble).

involving political or religious dissidents and detainees throughout the world." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 487-88 (1992) (internal quotes and citations omitted) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987)).

B. Factual Background

1. The Ethiopian-Eritrean war lasted from 1970 to 2000, making it the longest continuous war in African history. Eritrea's human rights abuses were a well-recognized feature of this conflict. In particular, the Department of State documented Eritrea's "arbitrary arrest and detention" of its citizens, commonly in connection with refusal to serve in the military. U.S. Dep't of State, *Eritrea Country Report on Human Rights Practices 2006* (2007), *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/ [hereinafter *Eritrean Country Report*]. The Eritrean government routinely "round[ed] [up] young men and women for national service," and "incarcerat[ed] and tortur[ed] family members of national service evaders." *Ibid.* Those put in jail faced unspeakable conditions, including "torture and beatings of prisoners" and "harsh and life threatening prison conditions." *Ibid.*

The *Eritrean Country Report* explains that the Eritrean government still "use[s] * * * deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders," and that "persons detained for evading national service [often] die[] after harsh treatment by security forces * * *." *Ibid.* The report includes accounts of "individuals [being] severely beaten and killed during government roundups of young men and women for national service." *Ibid.*

Additionally, the Eritrean government has banned all but four officially state-sanctioned religions. The government is reported to harass, arrest and intimidate those practicing non-sanctioned religions, primarily Protestants. *Ibid.* As a result of these practices, tens of thousands of Eritreans have fled the country, seeking asylum in countries across the world. See, *e.g.*, U.N. High Comm. for Refugees, News, *UNHCR looks at solutions for Eritrean refugees of eastern Sudan, available online at* http://www.unhcr.org/news/NEWS/46cc4a974.html. For these individuals, "repatriation is no longer a viable option" because it could mean death, imprisonment or torture. *Ibid.*

2. Petitioner Daniel Girmai Neguise was a citizen and resident of Eritrea in 1994 when he was arrested and "forced to perform hard labor in a facility that dug and processed salt for approximately one month." App., *infra*, 10a.[3] Petitioner subsequently underwent military training and was assigned to be a gunner on a naval vessel. He testified that he never fired the gun at individuals or other boats. *Ibid.*

When hostilities between Eritrea and Ethiopia resumed in 1998, petitioner—who had been discharged from the military—was conscripted into military service for a second time. He refused to go to the front and was sent instead to a naval base. In July 1999, petitioner was arrested, taken to a prison camp, and placed in solitary confinement for six months. He then was transferred to a cell with other prisoners, "was forced to perform hard labor most

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3. The Immigration Judge found petitioner's testimony credible (App., *infra*, 14a) and based his discussion of the facts upon petitioner's testimony.

days," and held in "hot, miserable, poor sanita[ry]" conditions. App., *infra*, 11a.

During his confinement, petitioner converted to the Protestant religion. He was punished for an approximately two-week period, at least in part because of his religion. Petitioner was required "to roll around on the ground in the hot sun. And if he became fatigued and stopped the rolling, then the authorities there would beat him with sticks." App., *infra*, 12a. When the period of punishment ended, petitioner's superior "threatened to personally kill him if he caught him practicing his religion again." *Ibid.*

After two years of incarceration, petitioner became a guard. "At times, he would guard the ocean, at other times, he would guard the gate. * * * And at other times, he was a prison guard." *Ibid.* Although a guard, petitioner "was not permitted to leave the base." *Ibid.*

Petitioner refused orders to punish prisoners and at one point gave water to a prisoner who was "out in the sun being punished"; his supervisor "threatened him for giving the prisoner water." App., *infra*, 13a. Petitioner's duties included "keep[ing] the prisoners from taking showers and obtaining ventilation and fresh air, but from time to time, he would allow the women to take showers and the prisoners to get fresh air." *Ibid.* He did see prisoners exposed to the intense heat of the sun and knew that "it was likely that death would ensue, because a person couldn't stand being in the sun for so long." *Ibid.*

After two years as a guard, petitioner found an opportunity to escape. He hid himself in a shipping container, came to the United States, and applied for asylum and withholding of deportation. App., *infra*, 19a.

C. Administrative Proceedings

1. The Immigration Judge (IJ) rejected petitioner's asylum claim and his claim for withholding of deportation. App., *infra*, 20a. He found that there was "no evidence to establish that [petitioner] is a malicious person or that he was an aggressive person who mistreated the prisoners," but that "the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from relief." *Id.* at 16a-17a.

The IJ went on to find that "it is more likely than not that [petitioner] would be tortured if returned to his native land" because he was a deserter from the armed forces and, in addition, because of his religion, his political opinion, and his nationality. App., *infra*, 20a. He therefore granted petitioner's request for deferral of removal under the Convention Against Torture. See 8 C.F.R. § 1208.17.[4]

2. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. App., *infra*, 8a. It deter-

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4. Deferral of removal is available to those asylum-seekers who would qualify for asylum and withholding of removal but for the application of a statutory provision requiring "mandatory denial" of asylum and withholding, such as the persecutor exception. *Ibid.* Without asylum or withholding of removal, petitioner cannot become a lawful permanent resident of the United States. Deferral of removal "[d]oes not confer upon the alien any lawful or permanent immigration status in the United States." 8 C.F.R. § 1208.17(b)(1)(i). Without any legal right to be in the country, petitioner may be detained at any time by the Immigration and Naturalization Service. 8 C.F.R. § 1208.17(c). He also "may be removed at any time to another country where he or she is not likely to be tortured." 8 C.F.R. § 1208.17(b)(2).

mined that "[t]he fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial. * * * '[A]n alien's motivation and intent are irrelevant to the issue of whether he "assisted" in persecution . . . [I]t is the objective effect of an alien's actions which is controlling.'" *Id.* at 6a (citation omitted).

The BIA upheld the IJ's finding that "the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters" and that therefore petitioner "is more likely than not to be tortured upon a return to Eritrea by the Eritrean government." *Id.* at 8a.

D. The Decision of the Court of Appeals

The court of appeals denied the petition for review of the BIA's decision (App., *infra*, 1a-3a). Applying *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003), the court ruled that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." App., *infra*, 2a.

Bah upheld the application of the persecutor exception to a young man who had been forced to assist the "Revolutionary United Front" (RUF) insurgency in Sierra Leone, another country torn by violent civil strife. Bah joined the RUF after RUF soldiers, who had "raped and killed his sister" and "incinerated his father," offered him "the option to join the RUF or die." 341 F.3d at 349. "Bah twice tried to escape * * *. During his second captivity, soldiers poured palm oil on his back and placed him face down with his back towards the sun in order to burn him." *Id.* at 350. Under the constant threat of continued torture and death, Bah was coerced into committing a number of

violent acts, including the taking of lives. *Ibid.* In his third escape attempt, Bah reached the United States where he applied for asylum.

The Fifth Circuit upheld the BIA's determination that the persecutor exception barred granting asylum to Bah despite "his forced recruitment" and forced participation in the activities of the RUF. *Id.* at 351. "The syntax of the statute," the court concluded, "suggests that the alien's personal motivation is not relevant * * *. Bah participated in persecution, and the persecution occurred because of an individual's political opinions." *Ibid.*

The court below concluded that *Bah* controlled the disposition of petitioner's appeal in this case. The court acknowledged that petitioner "did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, [and] did favors for prisoners." App., *infra*, 2a-3a. It concluded, however, that "[t]he question whether an alien was compelled to assist authorities [in persecution] is irrelevant, as is the question whether the alien shared the authorities' intentions." App., *infra*, 2a (citing *Bah*, 341 F.3d at 351).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's reading of the Nation's asylum laws is in direct conflict with a decision of the Eighth Circuit and with the reasoning of the First and Ninth Circuits. The practical result of this conflict is that the eligibility for asylum of individuals who (like petitioner) were coerced by threat of death and torture into participating in atrocities abroad now turns decisively on where they happen to file their application for asylum.

Resolution of the question presented likely affects hundreds of asylum applications each year. Violent civil strife in countries around the world frequently involves coerced participation in armed conflict. Trends in the sources of new asylum claims in the United States reflect a pattern of increasing numbers of asylum seekers from such nations.

Finally, and wholly apart from creating a conflict among the circuits, the position adopted by the Fifth Circuit ignores the plain meaning of the statute and contravenes the very purpose for which the Refugee Act's persecutor exception was enacted—to bring the Nation's immigration laws into conformity with international standards for asylum, standards that have long included a duress exception to the persecutor exception. Review by this Court is thus essential to restore uniformity to the application of this Nation's asylum laws with respect to the question presented and to correct the Fifth Circuit's error.

A. There Is A Square Conflict Among The Courts Of Appeals Regarding The Question Presented.

The Fifth Circuit upheld the denial of petitioner's application for asylum on the basis of its prior holding in *Bah* that compulsion is irrelevant to the application of the persecutor exception. The Second Circuit applies the same standard as the Fifth Circuit. This interpretation of Sections 208 and 241 of the INA squarely conflicts with a holding of the Eighth Circuit, which has held that individuals coerced by threat of death or torture into participating in atrocities are eligible for asylum in the United States.

Moreover, although the First and Ninth Circuits have not specifically addressed the coercion issue, their recognition of other mitigating circumstances,

such as ignorance and self-defense, is inconsistent with the rationale of the Fifth Circuit. It seems likely that these courts would adopt the view of the Eighth Circuit if presented with the compulsion issue. Review by this Court is essential to clarify this important area of asylum law.

1. The Courts of Appeals Are Divided Over The Relevance Of Coercion To The Application Of The Persecutor Exception.

There is a square conflict among the courts of appeals on whether the persecutor exception applies to asylum-seekers who were themselves *coerced* into participating in persecution. Two courts of appeals have concluded that proof of such compulsion is irrelevant to application of the persecutor exception. One is the Fifth Circuit, which so held both in *Bah* and the in present case. See App., *infra*, 2a ("The question whether an alien was compelled to assist authorities [in persecution] is irrelevant, as is the question whether the alien shared the authorities' intentions." (citing *Bah*, 341 F.3d at 351)). The other is the Second Circuit. See *Xie* v. *INS*, 434 F.3d 136, 140-41 (2d Cir. 2006) (denying relief where "Xie bases his petition * * * in large measure on the notion that his conduct was not voluntary. Neither the relevant statutes nor the case law, however, provides support for an 'involuntariness' exception to 'assist[ance] in persecution.' * * * [T]he phrase 'assisted in persecution' [does not] implicitly include[] a voluntariness requirement.").

The Eighth Circuit applies the opposite rule. See *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001). *Hernandez* involved the asylum claim of a man who had been kidnapped by Guatemalan guerillas and forced to join their group and participate in their ac-

tivities under threat of death. See *id.* at 809. The Eighth Circuit reversed the BIA's denial of asylum, holding that where an alien's conduct "was at all times involuntary and compelled by threats of death," and where the alien "shared no persecutory motives with the guerillas," the bar against asylum and withholding of removal does not apply. *Id.* at 814.

The Fifth Circuit's holding below cannot be reconciled with *Hernandez*. Accordingly, had the petitioner here applied for asylum in the Eighth Circuit, the BIA could not have applied the persecutor exception to his application.

2. The Courts Of Appeals Are In Conflict Over The Role Of Culpability In General When Applying The Persecutor Exception.

Although the First and Ninth Circuits have not addressed the *specific* issue of duress, compulsion, or coercion, they have concluded that the persecutor exception to asylum and withholding of removal contemplates an alien's culpability and mental state in general. Accordingly, had petitioner filed his application for asylum in one of those circuits, it is likely that the BIA's decision in this case would have been overturned.

In *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17 (1st Cir. 2007) (en banc), the IJ and BIA had applied the persecutor exception to an alien who claimed not to have known that persecution had occurred during a military operation in which he had participated. The First Circuit vacated and remanded. The court reasoned that the fact that the statute lacks an "explicit scienter requirement," is not a persuasive basis to conclude that "assistance in persecution" takes

place any time an alien's action has the "'objective effect' of facilitating persecution." *Id.* at 20, 22. Instead, the court explained, "the term 'persecution' strongly implies both scienter and illicit motivation." *Id.* at 20. Noting that most cases analyzing the persecutor exception "tend to reaffirm the need for some degree of moral culpability" and that "most case law assumes or affirms the need for some degree of subjective fault," *id.* at 21, the court held that "the persecutor bar should not be read to apply to" an alien who does not "possess[] such scienter as [is] required under the circumstances," *id.* at 22.

The Ninth Circuit addressed another aspect of culpability in respect to the persecutor exception in *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247 (9th Cir. 2004). There, once again, the IJ and BIA had denied the alien asylum and withholding of removal. The Ninth Circuit reversed. Prior to arriving in the United States, the petitioner in that case had helped defend his Serbian town from attacks by Bosnian Croats. Although Serbians had engaged in a campaign of persecution against the Croats, Vukmirovic's participation in that conflict had been, according to the Ninth Circuit, a matter of self-defense. *Id.* at 1252. As the court explained:

> [T]he IJ erred by holding as a matter of law that "there is no provision under the law that exempts acts of self-defense from qualifying as persecution." This construction of the statute is untenable on its face. As a textual matter, holding that acts of true self-defense qualify as persecution would run afoul of the "on account of" requirement in the provision.

Ibid. The court therefore concluded that "individual accountability must be established" in order for the

persecutor exceptions to apply. *Ibid.* The same courts has since clarified that "[i]ndividuals are only rendered ineligible for asylum if they have provided *purposeful*, material assistance for the acts of persecution." *Im* v. *Gonzales*, 497 F.3d 990, 995-97 (9th Cir. 2007) (emphasis added) (reversing application of the persecutor exception on materiality grounds, although adverting to the relevance of the fact that the petitioner "had no viable alternative to his job as a prison guard" and was therefore "non-culpable").

The Fifth Circuit in this case relied on *Bah*'s conclusion that *any* factor that bears on the culpable mental state of an asylum-seekers is irrelevant to the application of the persecutor exception. The *Bah* Court rejected the refugee's claim that "he did not engage in political persecution because he did not share the RUF's intent of political persecution. * * * The syntax of the statute suggests that the alien's personal motivation is not relevant." *Bah*, 341 F.3d at 351. See App., *infra*, 2a ("The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." (citing *Bah*, 341 F.3d at 351)).

Bah's conclusion that "[t]he syntax of the statute" requires it be applied regardless of any factor that bears on the asylum-seeker's culpability cannot be reconciled with the First and Ninth Circuit's respective decisions in *Castañeda-Castillo* and in *Vukmirovic* and *Im*. The practical result of the Fifth Circuit's holding in this case is that any time the "objective effect" of an alien's actions is to assist in persecution, the persecutor exception applies. As the court below indicated, questions of "comp[ulsion]" and "intentions" are "irrelevant." App., *infra*, 2a. The only

relevant consideration is the alien's objective "conduct." *Ibid.*

These irreconcilable holdings are generating divergent outcomes in the disposition of asylum applications. Had either Castañeda-Castillo or Vukmirovic applied for asylum in the Fifth Circuit, the BIA would have been free to apply the persecutor exception to them on the theory that their "personal motivation is not relevant." App., *infra*, 2a. Not so in the First and Ninth Circuits. Moreover, because those circuits consider as relevant whether asylum-seekers are culpable actors in persecution, had petitioner in this case filed for asylum in either of those jurisdictions, the BIA would *not* have been free to apply the persecutor exception to him on the ground that he was coerced, and therefore non-culpable.

These cases demonstrate that the courts of appeals are confused over the role of culpability in the application of the persecutor exception – including the legal relevance of knowledge, purpose, and duress. Although the direct conflict of authority on the question presented between the Eighth Circuit and the Fifth and Second Circuits (relating specifically to the relevance of compulsion) provides sufficient grounds on which to grant the petition, review in this case is all the more warranted given that it provides an opportunity to clarify the relevance of culpability in general. Only this Court's intervention can provide the clarity so evidently needed.

B. This Case Presents A Frequently-Recurring Issue Of Substantial National Importance.

The courts of appeals' starkly inconsistent interpretations of the persecutor exception presents an issue of substantial importance. Given the large numbers of refugees from countries suffering from

civil strife, questions regarding the application of the persecutor exception to refugees forced to engage in acts of persecution are arising with increasing frequency—as demonstrated by the growing number of court of appeals decisions addressing the issue. This Court should grant review to ensure the uniform—and proper—administration of national immigration policy.

1. The Outcomes Of A Substantial Number Of Asylum Cases Each Year Depend On The Resolution Of The Question Presented.

Violent civil strife in countries around the world increasingly involves coerced participation in armed conflict "[T]he majority of refugees in the world today are * * * fleeing civil conflicts in which the distinction between oppressor and oppressed is often unclear." Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131, 1131 (2002).

The number of refugees from these countries seeking asylum in the United States is growing. The question whether the persecutor exception operates as a per se bar against such claims is therefore sufficiently important to warrant this Court's attention.

Hundreds of thousands of child soldiers from African countries, for example, are forced to serve in state and opposition armies. See *Hearing on the "Material Support" Bar Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First). These situations are becoming more and more common across the globe. Ex-

amples of countries in which combatants force innocent victims to take part in their persecutory acts include:

- Burma (see *Burma Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (describing forced conscription of child soldiers by armed militia groups);
- Columbia (see *Columbia Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting widespread recruitment of child soldiers by local guerrillas);
- El Salvador (see *Doe* v. *Gonzales*, 484 F.3d 445, 446-47 (7th Cir. 2007));
- Eritrea (see *Eritrea Country Report*) (citing reports of forced conscription into national service and numerous abuses including torture by security forces);
- Guatemala (see *Hernandez*, 258 F.3d at 808-09);
- Iraq (see *Iraq Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/ (citing occurrences of compelled child participation in violent activities of opposition groups).
- Peru (see *Peru Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting continuing conscription of indigenous population into Shining Path guerrilla forces);
- Somalia (see *Somalia Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (citing reports from previous year that militia groups forced minority groups into forced labor);
- Sudan (see *Sudan Country Report*, *available online at* http://www.state.gov/g/drl/rls/hrrpt/2006/) (noting forced military conscription of underage

men and numerous abuses carried out by security forces).

Asylum claims in the United States show a pattern of increasing numbers of refugees from these countries. In fact, five of these nations – Colombia, Ethiopia, Iraq, Burma, and Somalia – ranked in the top twenty-five source countries for asylum applications granted by the United States in 2006. See U.S. Dep't of Justice, *2006 Statistical Year Book*, J2 (Feb. 2007), *available online at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. El Salvador, Guatemala, and Peru each ranked in the top twenty-five countries represented in immigration court proceedings overall in 2006. *Id.* at E2. The United States additionally received over 200 asylum applications in 2006 from several other countries known for forced participation in persecution, including Gambia, the Ivory Coast, Liberia, and Sierra Leone; and nearly 100 asylum applications from the Sudan. *Ibid.*

The increased judicial attention to the question presented confirms the importance of the issue. In the last two years, the federal courts of appeals have decided nearly one dozen asylum appeals that turn on the resolution of the question presented. In addition to the cases already discussed, see *Feng Zheng* v. *Gonzales*, 232 Fed.App'x. 48, 50 (2d Cir. 2007) (affirming the denial of asylum under the persecutor exception even where the alien "had no choice" but to assist in persecution); *Dacaj* v. *Gonzales*, 177 Fed. App'x. 185, 187 (2d Cir. 2006) (denying relief because "[t]he relevant inquiry focuses not on the alien's volition or the extent of his participation, but on the nature of his conduct as a whole. Conduct amounts to 'assistance in persecution' if it is active and has direct consequences for the victims," regardless of culpability; under this standard, the alien's "conduct

was sufficient to constitute assistance in persecution"); *Jia Yun Li* v. *Gonzales*, 203 Fed. App'x. 360, 362 (2d Cir. 2006) (concluding that "the fact that [the alien] was obeying orders * * * [does not] relieve[] [him] of having assisted in persecution" (citing *Xie*, 434 F.3d)); *Xiao Jun Zhou* v. *United States Dep't of Justice*, 165 Fed. App'x. 20, 21 (2d Cir. 2006) ("On appeal, [the alien] primarily argues that he ought not be barred from relief because to the extent that he participated in persecution, such participation was not voluntary and was done only on orders from his military superiors. This argument is foreclosed by this Court's recent decision in *Xie* v. *INS*." (citations omitted)); *Ghazaryan* v. *Gonzales*, 172 Fed. App'x. 139, 140 (9th Cir. 2006) (affirming the BIA and IJ under the persecutor exception because the alien's "individual accountability [was] established" given that she "was under no compulsion to continue her employment as a prison guard" (citing *Vukmirovic*, 362 F.3d at 1252)).

2. The Conflict In This Case Is Producing Drastically Divergent Results In Identical Cases Across The Nation.

The increasing frequency with which immigration judges, the BIA, and courts of appeals are faced with cases like petitioner's is of particular concern given the drastic variation in outcomes created by the conflicting interpretations of the courts of appeals. As a result of the divergent approaches taken by the courts of appeals, refugees who were forced under threat of death to serve (for example) as guards in prisons run by persecutory regimes may obtain asylum and withholding of removal in the Eighth Circuit, while identically situated aliens will be expelled from the country in the Second and Fifth Circuits. If petitioner here lived in St. Louis, he would be a law-

ful permanent resident of the United States. Because he resides instead in Alabama, he is now subject to deportation to a country in which (all agree) he faces credible fear of future persecution and even death.

As a result of the starkly different outcomes available based on the conflicting views among the circuits, the conflict in this case strongly encourages aliens to forum shop. See, *e.g.*, Robert C. Leitner, Comment, *A Flawed System: The Immigration Adjudicatory System and Asylum for Sexual Minorities*, 58 U. Miami L. Rev. 679, 699 (2004) ("Rational aliens [will] concentrate only in the circuits that tend to produce favorable immigration decisions, thus limiting the great benefits and burdens of immigration to a few states."). Refugees entering the United States will predictably avoid States in the Fifth Circuit altogether for fear that they will be expelled for no fault of their own.

And while any conflict among the courts of appeals on a matter of federal law is a matter for concern, certiorari review is particularly appropriate where a split of authority results in such disparate outcomes in the application of the nation's asylum laws. The BIA, like any agency, is obliged to follow interpretations of law announced in the court of appeals that has jurisdiction over proceedings that it reviews. Because courts of appeals now disagree on the relevance of an asylum-seeker's culpability generally (and of duress in particular) under the persecutor exception, the BIA also now labors under intolerably inconsistent rules of law.

The Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. Art. I, § 8, Cl. 4; see also *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971) (acknowledging that the Naturaliza-

tion Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits "exercise[] [of the immigration and asylum power] only in a manner that is geographically consistent across the nation"). The divergence in the lower courts' resolution of the question presented here is generating drastic variation in the administration of the Nation's asylum laws. This Court's intervention is plainly warranted.

C. The Persecutor Bar Does Not Apply To Asylum-Seekers Whose Conduct Was Compelled By Threats Of Death Or Torture.

The plain language of the persecutor exception, and Congress's reasons for adopting it, make clear that Congress never intended to exclude from eligibility for relief refugees who were *coerced* to assist or participate in persecution. The Fifth Circuit's contrary holding ignores this Court's long-standing presumption that federal statutes incorporate traditional principles of culpability, including requirements of mens rea and excuses such as duress. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("We hold that mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced."); *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) ("We * * * recognize that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well [be] contemplated by Congress when it [passes a law imposing a legal penalty]." (citations omitted)).

1. The plain meaning of the word "persecution" requires purpose and intent on the part of the actor. Thus, the *Oxford English Dictionary* defines "persecution" as "the action of pursuing or persecuting a person or group *with hostile intent*." *Oxford English Dictionary* (2d ed. 1989) (emphasis added). The Latin root of "persecution," *prosequ*, means "to seek out, to pursue, to follow *with hostility or malignity* * * * on religious grounds." *Ibid.* (emphasis added). As the common-sense understanding of the words imply, "assistance" and "participation" in persecution also require the hostile intent inherent in persecution itself. See, *e.g.*, *Doe*, 484 F.3d at 449-450 (explaining that "assistance" is conduct akin to aiding or abetting, which traditionally require purpose); *Petkiewytsch* v. *INS*, 945 F.2d 871, 880 (6th Cir. 1991) ("participation" requires intent equivalent to that of a co-conspirator). The persecutor exception therefore should be construed to demand a showing, just as aiding and abetting a crime does, that a person "'in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishes to bring about, that he s[ought] by his action to make it succeed.'" *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d, Cir. 1938) (Hand, J.)).

This Court held in the very year that Congress passed the Refugee Act, moreover, that Congress "legislates against a background of Anglo-Saxon common law, [and] therefore a defense of duress * * * may well [be] contemplated by Congress" in the process of legislation, although not explicitly included within the statutory language. *Bailey*, 444 U.S. at 415 n.11. Even when Congress is silent as to application of the common law defenses, "[t]he du-

ress defense * * * may excuse conduct that would otherwise be punishable * * * 'because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.'" *Dixon* v. *United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bailey*, 444 U.S. at 402). This fundamental principle of statutory interpretation supports interpreting the provision to incorporate a duress defense.

2. Congress adopted the Refugee Act of 1980 to conform domestic law to our treaty obligations. *Aguirre-Aguirre*, 526 U.S. at 426-27 (1999) ("'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968." (citation omitted) (quoting *Cardoza-Fonseca*, 480 U.S. at 436-37)). Accordingly, this Court has recognized that "the U.N. Handbook [on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees] provides some guidance in construing the provisions added to the INA by the Refugee Act." *Id.* at 427.

Of particular relevance here, the Office of the High Commissioner for Refugees had authoritatively interpreted the Protocol's "exclusion clauses"—including its version of the persecutor exception[5]—as

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5. The Protocol exempts from asylum persons who have "committed a crime against peace, a war crime, or a crime against humanity [or who] has been guilty of acts contrary to the purposes and principles of the United Nations." See U.N. High Comm. for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Ch. IV(3)(a), U.N. Doc. HCR/IP/4/Rev.1 (1979) [hereinafter *Handbook*].

applying only to asylum-seekers whose "acts [are] of a *criminal nature*," including acts of "instigators and accomplices [and] conspira[tors]." *Handbook*, at ¶ 162, Annex V (emphasis added). In evaluating the applicability of the exclusion clauses, moreover, the *Handbook* stated that "all the relevant factors—including any mitigating circumstances—*must* be taken into account." *Id.* at ¶ 157 (emphasis added). Finally, "due to their nature and the serious consequences of their application to a person in fear of persecution," the *Handbook* admonished that "the exclusion clauses should be applied in a restrictive manner." *Id.* at ¶ 180.

Congress thus would have known at the time that it adopted the Refugee Act that the international legal standards with which it sought to conform United States law included a duress defense to the exceptions from eligibility for asylum. The only logical conclusion is that the Congress intended to exclude from the persecutor exception aliens compelled to engage in conduct constituting persecution. Any other result would frustrate Congress's goal of bringing United States law into conformity with international standards.[6]

3. Congress's second purpose in enacting the Refugee Act was "to give the United States sufficient

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6. In 2003, the U.N. High Commission for Refugees issued even clearer guidance in a document that superseded the *Handbook*, stating that the persecutor exception applies only to "responsib[le]" aliens who act with "knowledge and intent," a "mental element" that may be defeated by traditional "defenses to criminal responsibility," including "duress." U.N. High Comm. for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003).

flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 488 (1992) (quoting *Cardoza-Fonseca*, 480 U.S. at 450). Guided by its concern for the harshness and finality deportation, the *Elias-Zacarias* Court counseled that courts should seek to "increase[]," not decrease, that "flexibility." *Ibid.*

The rule applied by the court below does just the opposite. Rather than increasing the Attorney General and Secretary of Homeland Security's collective discretion to admit refugees who themselves were victims of persecution by being compelled on threat of death or torture to engage in the acts in question, the Fifth Circuit has tied their hands. Now "the Attorney General may not even *consider* granting asylum to one who fails" the Fifth Circuit's strict liability standard. *Ibid.* (emphasis added). Given the increase in civil strife and such coercive behavior around the world, the construction of the statute adopted by the court below will eliminate discretion to "respond to situations involving political or religious dissidents and detainees."

4. The Fifth Circuit erroneously based its interpretation of the persecutor exception on this Court's rejection of a voluntariness requirement in *Fedorenko* v. *United States*, 449 U.S. 490 (1981). *Fedorenko* addressed the now-expired Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, 62 Stat. 1009 (1948), which had been passed to address the narrow range of unique asylum problems associated with Nazi war crimes committed during the Second World War.[7]

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7. Section 2(c) of the DPA, for instance, defined an "[e]ligible displaced person" as one who "on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria,

The Court's decision in *Fedorenko* was based on the specific language of the DPA, language that Congress did *not* include in the persecutor exception in the Refugee Act. Thus, the Court observed that the DPA specifically excluded from the definition of eligible displaced persons "individuals who had 'assisted the enemy in persecuting [civilians]' or had '*voluntarily* assisted the enemy forces * * * in their operations * * *.'" *Fedorenko*, 449 U.S. at 495 (emphasis added). It reasoned that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512 (emphasis in original).

The Refugee Act's persecutor exception does not include the word "voluntary." Accordingly, *Fedorenko*'s statutory analysis is wholly inapposite. Rather, the plain language of the Refugee Act provision, and the fact that it was enacted to conform U.S. law to international standards for asylum *generally* (standards that included a duress exception), compel the conclusion that Congress did not intend to apply the persecutor exception to refugees compelled against their will to engage in conduct amounting to persecution. See, *e.g.*, *Singh* v. *Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005) (holding that *Fedorenko*'s

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or Italy and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria; or a person who, having resided in Ger-many or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such persecution and was subsequently returned to, one of these countries as a result of enemy action, or of war circumstances * * *." 62 Stat. 1009.

interpretation of the DPA "is not fully compatible with the present statutory and factual situation," involving the INA's persecutor exception).

Even if *Fedorenko* were relevant to interpreting the INA's persecutor exception, moreover, it would not support the Fifth Circuit's refusal even to consider evidence of coercion in determining whether the persecutor exception applies in a particular case. This Court recognized that the question whether "particular conduct can be considered assisting in the persecution of civilians" may "present difficult line-drawing problems." *Fedorenko*, 449 U.S. at 514 n.34. Even under *Fedorenko*, "a court faced with difficult 'line-drawing problems' should engage in a particularized evaluation in order to determine whether an individual's behavior was *culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution*." *Hernandez*, 258 F.3d at 813 (emphasis added).

* * * * *

The courts of appeals are divided over whether the INA's persecutor exception prohibits the granting of asylum to, and withholding of removal of, an alien who was compelled against his will to assist or participate in persecution. This issue is litigated with great frequency and, as a result of the conflict among the circuits, asylum-seekers receive dramatically different outcomes based on the circuit in which they reside. Only review by this Court can restore uniformity to the application of this Nation's asylum law and correct the erroneous legal standard applied by the court below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX

APPENDIX A

DANIEL GIRMAI NEGUSIE,
Petitioner
v.
ALBERTO R GONZALES,
US ATTORNEY GENERAL,
Respondent

No. 06-60193 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
May 15, 2007, Filed

Petition for Review of a Decision of the Board of Immigration Appeals, BIA No. A15 575 924.

Before KING, HIGGINBOTHAM and GARZA, Circuit Judges.

PER CURIAM:[1]

Eritrean citizen Daniel Girmai Negusie petitions for review of the decision of the Board of Immigration Appeals (BIA) denying his application for asylum and withholding of removal.

Negusie contends that the BIA erroneously determined that he assisted in the persecution of others on the basis of a protected ground, rendering him

1. Pursuant to *5th Cir. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5th Cir. R. 47.5.4*.

ineligible for asylum or withholding of removal, pursuant to *8 U.S.C. § 1158(b)(2)(A)(i)* and *8 U.S.C. § 1231(b)(3)(B)(i)*. Negusie argues both that he did not assist in persecution when he worked as a guard in a military prison and that the record did not indicate that he was involved in any persecution of others on a protected ground.

In his brief to the BIA, Negusie stated that he "did not . . . assist or otherwise participate in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. In fact, he risked his life on numerous occasions to help those *who were facing such persecution*." Negusie thus conceded that the prisoners were persecuted on protected grounds. *See Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992)* (a litigant's factual assertions ordinarily are binding). Moreover, Negusie testified that, during his own imprisonment, he learned about Protestant Christianity from people who were imprisoned because of their religious beliefs. Additionally, a State Department report from 2004 indicated that the Eritrean government actively persecuted numerous Protestant groups.

The question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions. *Bah v. Ashcroft, 341 F.3d 348, 351 (5th Cir. 2003)*. Rather, the inquiry should focus "on whether particular conduct can be considered assisting in the persecution of civilians." *Fedorenko v. United States, 449 U.S. 490, 512 n.34, 101 S. Ct. 737, 66 L. Ed. 2d 686 (1981)*.

Negusie did not affirmatively, personally injure the prisoners, and he objected to, and occasionally

disobeyed, orders to inflict punishment, did favors for prisoners, and was reprimanded for doing so. However, he worked as an armed prison guard. He knew about the forms of punishment used by his superior officer. He stood guard while prisoners were kept in the sun as a form of punishment, and he acknowledged that his job description included depriving prisoners of access to showers and fresh air. He also stated that he hated his job because he saw prisoners suffer on a daily basis. The Immigration Judge considered Negusie's testimony about his redemptive acts of assistance to prisoners and gave that testimony little weight.

The evidence does not compel a conclusion that Negusie did not assist in the persecution of prisoners. *See Bah, 341 F.3d at 350.* Negusie thus was ineligible for asylum or withholding of removal.

PETITION DENIED.

APPENDIX B

FILE: A15 575 924 - NEW ORLEANS
DATE: Feb 07, 2006
IN RE: DANIEL GIRMAI NEGUSIE
IN ASYLUM ONLY PROCEEDINGS PURSUANT TO
8 C.F.R. § 1208.2(c)

APPEAL

ON BEHALF OF APPLICANT:
Hiroko Kusuda, Esquire
ON BEHALF OF DHS:
Harris Lee Leatherwood
Assistant Chief Counsel

APPLICATION

Asylum; withholding of removal;
Convention Against Torture

ORDER:

PER CURIAM. The applicant appeals from an Immigration Judge's May 31, 2005, decision denying his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act. The Department of Homeland Security (the "DHS," formerly, the Immigration and Naturalization Service) appeals from the Immigration Judge's decision granting deferral of removal under the United Nations Convention Against Torture. The respondent's appeal is dismissed. The DHS's appeal is also dismissed.

The Immigration Judge found that the respondent provided credible testimony at the hearing below (I.J. at 7-8). This credibility determination is not clearly erroneous. *See United States v. National*

Assn. of Real Estate Boards, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). Among the facts found by the Immigration Judge are that the respondent is a citizen of Eritrea who was forced by the Eritrean government to serve as a guard at a prison camp operated by the Eritrean army (I.J. at 4-6; 7-9). In this capacity, the respondent: guarded the gate to watch for and admit senior officials (I.J. at 4); guarded prisoners to ensure they did not flee (I.J. at 8); and guarded prisoners placed out in the hot sun as a form of punishment (I.J. at 9). The respondent takes issue with the latter two findings with regard to his role guarding prisoners, as these facts were taken in part from the respondent's credible fear interview rather than his trial testimony. *See* Respondent's Brief at 20-22 (arguing that the Immigration Judge should not have credited as true the answers given during the credible fear interview because such interviews are generally less reliable than in-court testimony). However, we note that the respondent nowhere argues that his statements to the interviewer were false. *Id.* Furthermore, the Immigration Judge did not accept the credible fear interview statements over contradictory statements given at trial. Rather, the Immigration Judge noted that all of the statements, at trial and before the interviewer, could be read together to form a complete picture of the respondent's activities during the time he was a prison guard in Eritrea (I.J. at 7-9). The Immigration Judge found appropriate indicia of reliability in those statements because they did not directly contradict any information given at trial. *Id.* Accordingly, we find no clear error in the Immigration Judge's finding that the statements given at the credible fear interview were reliable evidence of the

respondent's role as a prison guard for the Eritrean army. *See United States v. National Assn. of Real Estate Boards, supra.*

Given the respondent's role as a prison guard, we affirm the Immigration Judge's finding that the respondent is barred from the relief of asylum or withholding of removal under the Act as one who has assisted in the persecution of others on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* sections 208(a)(2)(A)(i), 241(b)(3)(B)(i) of the Act. Because the Immigration Judge found that prisoners were tortured and left to die out in the sun and there appears to be no dispute that this treatment was on account of a protected ground,[1] we find that the respondent's involvement as a prison guard was not limited to "military activities of a type normal in such conflicts" and as such, he is barred from the above-mentioned forms of relief. *See Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988); *Matter of Fedorenko*, 19 I&N Dec. 57, 69 (BIA 1984). The fact that the respondent was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial. First, "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution ...[I]t is the objective effect of an alien's actions which is controlling." *See Matter of Fedorenko, supra,* at 69 (citing *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983). Second, even if we take the facts in the light most favorable to the respondent, and assume that his max-

1. In fact, the respondent argues that he also was subjected to mistreatment in these same prisons on account of his religion, political opinion, and nationality. *See* Respondent's Brief at 9-16.

imum conduct as a guard consisted of "[keeping] watch over some prisoners," Respondent's Brief at 3, he still is subject to the so-called "persecutor bar" under our precedential decision in *Matter of Fedorenko*, *supra*, as he has not demonstrated that his conduct is distinguishable from that of the alien in that case, who was forced to serve as a "perimeter guard" for the Nazis during World War II. *See Matter of Fedorenko, supra*, at 65-66.[2] We also note that the United States Court of Appeals for the Fifth Circuit, under whose jurisdiction this case arises, also has applied the persecutor bar in sections 208(a)(2)(A)(i) and 241(b)(3)(B)(i) of the Act to aliens, like the respondent, who argue that they were forced into assisting in the persecution of others. *See Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003).

We turn now to the DHS's appeal of the grant of deferral of removal pursuant to the Convention Against Torture. The DHS argues that the respondent's forced military service after he completed his initial service should not be considered an "illegal" act by the Eritrean government and thus, the government's attempted enforcement of its military recruiting policies does not amount to torture. *See* DHS Brief at 5-6 (citing 8 C.F.R. § 1208.18(a)(3)). However, we note that the Immigration Judge's grant of deferral of removal was based upon background evidence in the record that indicates that the Eritrean government uses deadly force against citizens in a

2. In rendering our decision in *Matter of Fedorenko*, we specifically relied upon lower factual findings that the alien did not "commit[] any atrocities" while forced to guard the Nazi camp. *Matter of Fedorenko, supra*, at 69. Thus, the respondent's attempt to distinguish that case from his own by citing witness testimony relating to Fedorenko's alleged beating and whipping of prisoners must be rejected. *See* Respondent's Brief at 23.

number of contexts, including against army deserters (I.J. at 13). Therefore, the appropriate inquiry is whether the record supports the conclusion that it is more likely than not that the Eritrean government would torture the respondent on that basis; the forced recruitment issue raised by the DHS is not the pivotal issue in the Immigration Judge's decision.

The Immigration Judge found reliable evidence in the record that the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters (I.J. at 13). This finding is not clearly erroneous. *See United States v. National Assn. of Real Estate Boards, supra*. Specifically, the United States Department of State Country Report for Eritrea (2004) states that "security forces severely mistreated army deserters and draft evaders." *See* Exh. 4-B at 2. There is evidence that army deserters have disappeared after return to Eritrea from a safe third country (Exh. 4-D at 2). Another 2005 report by Human Rights Watch states that "[t]hose accused of evading [military] service are frequently tortured" (Exh. 4-G at 3). The DHS offers no argument as to why this evidence should not be given due weight. Based upon the record, we see no error in the Immigration Judge's determination that the record supports the conclusion that the respondent is more likely than not to be tortured upon a return to Eritrea by the Eritrean government. *See* 8 C.F.R. § 208.18(a)(1), (7).

Accordingly, the respondent's appeal is dismissed. The DHS's appeal is also dismissed.

/s/
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
New Orleans, Louisiana

File A 15 575 924

May 31, 2005

In the Matter of
DANIEL GHIRMAY NUGUSA
Respondent

IN REMOVAL PROCEEDINGS

CHARGE

APPLICATION
Asylum, withholding of deportation and protection under the Convention Against Torture

ON BEHALF OF RESPONDENT
Brooke Robinson, Esquire

ON BEHALF OF DHS
Stan Weber, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 29-year-old male, native of Eritrea and a citizen of Eritrea, who is actually a joint national and both a citizen of Ethiopia. A Notice of Referral to the Immigration Judge was issued to the respondent on January 27, 2005. The issue before the Court concerns the respondent's applications set forth above.

SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED

Respondent is half Eritrean and half Ethiopian. His mother was of Eritrean nationality, and his father was an Ethiopian. Respondent finished school in 1994, and went out to look for a job. Several months passed, respondent was attending a movie. When the movie was over, he and the others in the movie left the movie house, only to discover that the Eritrean police or military were outside and attempted to apprehend all of those leaving the movie. Some of them ran, respondent testified, shots were fired in the air, but no one was hit. Respondent was one of those who was caught and arrested.

He testified that the arresting persons gave him no reason for the arrest or any explanation, but as it turned out, what was actually happening was the respondent and the others were people that the government of Eritrea were conscripting into military service. Respondent was taken into custody, forced to perform hard labor in a facility that dug and processed salt for approximately one month. Then he was transferred to another facility where he underwent military training for approximately six months. Then he was, assigned to a permanent station at a Navy yard, where he was assigned to a boat that carried heavy armaments. Respondent was a gunner. However, he testified that he never fired the guns at persons or other boats.

In 1998, war broke out between Eritrea and Ethiopia, and even though respondent had been discharged sometime earlier, a notice was published by the government of Eritrea that all those who previously discharged must report for military duty, and

the respondent reported and was conscripted into military service a second time.

Respondent testified that he was verbally abused, because of his dual nationality. He said that they called him names. One of the names he mentioned was Amara, which although he did not explain what that meant, it was a derogatory term. That he was treated differently from other people; mainly, in that, or his testimony was that he was subject to verbal abuse and verbal attacks.

Respondent objected to being called to duty and declined to go to the front and fight, because he said he did not want to kill his Ethiopian brothers.

Respondent was assigned to a Navy base for about a year and was not sent to the front. In July of 1999, respondent was arrested and taken to a prison camp. He said that a friend of his awoke him one morning and said come, go with me, and took him to a cell that was beginning of two, years incarceration. He said he was held in a dark cell for approximately six months, during which time, he was alone. After that period of approximately six months, he was transferred to another cell with other people. Conditions, he described as very hot, miserable, poor sanitation, and he was forced to perform hard labor most days.

While he was in prison for this two year period, he was punished for approximately two weeks. He testified that he was punished, because he was talking to other Protestants, and that was based on his religion. However, upon cross-examination, he indicated that he was punished, because they were under standing directive not to speak to one another; that is, all of the prisoners. But the respondent was talking to other people, who were, Protestants.

During the period of his incarceration, the respondent testified that he was actually converted from Orthodox religion to Protestantism.

Respondent testified that during this two week period while he was punished more severely, that he was mistreated by being required to roll around on the ground in the hot sun. And if he became fatigued and stopped the rolling, then the authorities there would beat him with sticks.

Respondent now thinks that he was in prison for two years, because he had initially refused to fight in the war.

After the two year period of incarceration, respondent was released from prison and returned to duty as a prison guard, a duty which he performed on a rotating basis for approximately four years. At times, he would guard the ocean, at other times, he would guard the gate. Principally, to open the gate or guard the gate and be on the watch for senior officials, who were returning to the facility. And at other times, he was a prison guard.

Respondent testified that he carried a gun as a guard. He testified that while he was in the prison for that two year period, he was detained for approximately 20 days as a result of practicing his religion. And when he was released from that 20 day period of time, his superior threatened to personally kill him if he caught practicing his religion again.

Respondent testified that as a guard, his duties were at times, to guard the gate as a security guard, at other times, to guard the ocean, and third time would be to be a prison guard, and during these times, he carried a gun.

He testified that although he was a guard, he was not permitted to leave the base. He said that at

times, he was ordered to punish prisoners, but he refused to punish the prisoners. At one point, a prisoner who was out in the sun being punished, the respondent testified that he gave the prisoner water, that the supervisor found out about it and counseled respondent and threatened him for giving the prisoner water, demanding an explanation as to why he would do that. And that subsequently, after respondent was released without any kind of severe punishment, the man to whom he had given the water eventually died in the sun.

Respondent testified that part of his duties were to keep the prisoners from taking showers and obtaining ventilation and fresh air, but from time to time, he would allow the women to take showers and the prisoners to get fresh air.

At one point, respondent was caught disobeying an order and said that the supervisor accused him of being a spy.

The respondent, as a guard, saw other prisoners who were exposed to the sun, and he testified that he heat was very intense, and if you were outside in the sun, exposed for more than a couple of hours, that it was likely that death would ensue, because a person couldn't stand being in the sun for so long.

STATEMENT OF THE LAW

In order to be eligible for asylum under Section 208 of the Act, a respondent must show that he unable or unwilling to return to his country, because of "persecution or a well founded fear of persecution on account of on account of race, religion, nationality, membership in a particular social group or political opinion." Section 101()(42)(A), *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In *Matter of Moaharrabi*, 19 I&N Dec. 439 (BIA 1987) the Board of Immigration Appeals adopted a reasonableness standard to determine whether one's fear of persecution was well-founded.

In order to be eligible for withholding of removal to any country, respondent must show that his "life or freedom would be threatened in such country on account of on account of race, religion, nationality, membership in a particular social group or political opinion." 241(b) (3)(A). This statutory provision requires him to demonstrate a "clear probability of persecution on one of the five grounds set forth in the Act." *INS v. Stevic*, 467 U.S. 407 (1984). Respondent must demonstrate "that it is more likely than not" he would be subject to persecution if returned to his native land. This is more stringent standard than that required for asylum.

In order to be eligible for protection under Article 3 of the Convention Against Torture, a respondent must establish that he would be subject to torture "by or at the instigation of, or with the consent or acquiescence of a public official or person acting in an official capacity. Respondent must establish the likelihood of persecution, that it is more likely than not. 8C.F.R. Section 1208.18(a)(1).

FINDING AND CONCLUSIONS OF THE COURT

The first issue that the Court will address is the respondent's credibility. The Court concludes that the respondent's testimony at that hearing was largely credible. Some of the things about which the respondent testified, challenged the Court's ability to comprehend, but I do not conclude that the respondent was necessarily being deceptive in his recitation of the events. Rather, the Court concludes that Eritrea and the government and governing body and the

way things happen in Eritrea are in very large measure arbitrary, capricious and irrational, because that's the only way the Court can square some of the things about which respondent testified and accept them as having happened.

However, the Court concludes that the respondent's applications for asylum and withholding or deportation under Section 241(b)(3) and for withholding under the Convention Against Torture are barred by the provision of the statute that bars, relief to one who has assisted or otherwise participated in the persecution of others.

In terms of the respondent's credibility, the Court notes that in the answers to questions that were addressed to him by the asylum officer at this asylum interview, the Court finds that answers to those questions not completely inconsistent with the respondent's testimony, but that they more accurately reflect the terms of his participation as a prison guard and form in large measure the basis for the Court's conclusion that he respondent aided or otherwise participated in the persecution of others.

Just to go over a few of the answers, one question: Did you ever execute, injure, harm or torture anyone? Respondent's answer: No, I never did that, which the Court would note is consistent with the respondent's testimony. Next question: Did you ever guard prisoners? Answer: Yes. People who wanted to flee. We were the ones watching them. Next question: Were any of these people that you caught trying to leave executed? Answer: No. But they would punish them by putting them in the sun, and they would die, because of that. Next question: Did you have personal interaction with the people that died because of sun exposure? Answer: Yes. Next ques-

tion: Were you guarding them to make sure they stayed out in the sun? Answer: Yes. Next question: How long were these people made to stand out in the sun? Answer: The sun is very hot, and if you stay for two hours there, you cannot stand it. The person I know who died is because he stayed there over two hours. Next question: How many people did you force to stay out in the sun? Answer: I didn't force them.

Respondent also testified that he was a guard for four years, rotating between guarding the gate, opening it when senior officers came, guarding the ocean and guarding prisoners. He testified that he carried a gun. Respondent sought to minimize his participation in his testimony by saying that he didn't shoot anyone, he didn't put anyone out in the sun, and he did not otherwise punish prisoners, even when he was directly ordered to punish them. He said he refused orders, and that he was reprimanded for that by a supervisor. He also said that he allowed women to take showers at times and had allowed some of the prisoners to get fresh air and once gave water to a prisoner who was out in the sun and who eventually died.

However; the Court concludes that he assisted or participated in the persecution of others; in that, he guarded them, so that they were not able to leave the prison camp. He guarded them, so they were not able to get fresh air, and he guarded them, so they could not take showers, which assisted the government of Eritrea in its persecutory conduct. He also carried a gun in the performance of his duties. Although the Court concludes that there's no evidence to establish that the respondent is a malicious person or that he was an aggressive person who mistreated the prisoners, the Court concludes the very fact that he helped keep them in the prison compound where he had

reason to know that they were persecuted constitutes assisting in the persecution of others and bars the respondent from relief. See *Federinko v. U.S.*, 449 (1981), *U.S. v. Schmidt*, 923 F.2'd 1253 (7th Cir. 1991) and *Bah v. Ashcroft*, 341 F.3'd 348 (5th Cir. 2003).

That leaves for the Court to decide whether the respondent has established that he is eligible for deferral of removal under the Convention Against Torture. The Court concludes that the respondent is eligible for deferral of removal under that provision.

The Court would note for the record that this is a very difficult conclusion for the Court to come to, because so much of what is presented here is just flatly irrational. As a couple of examples, respondent testified that he was talking to people, to other prisoners, when that was prohibited. When the officers, his superiors, reprimanded him, they accused him of being a spy. There is no relationship between talking to prisoners and being a spy. That's a non sequitur. Respondent testified that he fears death if he is returned for a number of reasons; however, he testified here that he disobeyed orders over and over and over and over again. Sometimes he would be punished, sometimes he would not. He further testified that while he was in prison for a two year period of time, he was imprisoned for that period of time without explanation. After he came to the United States, apparently, he concluded that, that must have been because he had refused to fight in the war; however, his imprisonment didn't take place or did not begin until close to a year after that period, and it happened without warning or explanation. One of his friends woke him up one morning and said come, go with me, which began a two year period of incarceration. The cause and effect relationship here is weak,

although I believe the respondent when he testified that he was incarcerated for two years and was mistreated during a large part of that time.

The respondent bases his claim of torture and persecution on a number of incidents which are related largely because they relate to him, but do not follow a consistent pattern or theory of his case. The first one he indicated was when he was conscripted after leaving the movie theater in 1995. The normal rule is that an individual can be conscripted and required to perform military service in accordance with international law, and the law is recognized by the United States. However, in 1998, after the respondent had been conscripted and served what was his obligatory time period for national service, he was again conscripted and this time, for an indeterminate period.

And during that period of conscription, it was interrupted for reasons without explanation for him to serve a two year period of time in prison, part of which time, he was seriously abused. Then he testified that he was released from prison after this period of time, during which he was abused, and then returned to his position as a prison guard and given a gun. To the Court, that's incomprehensible, that the government would have him in jail one minute and then pull him out and give him a gun the next. However, I accept the respondent's testimony that, that actually happened.

That all of these irrational things that happened weaken the Court's confidence that it can predict what the Eritrean government would do. The respondent had claimed fear of persecution based on his conversion to Protestantism, but he referred to only one instance where he was arrested or abused alle-

gedly for practicing his religion, and that happened while he was already in prison. And although he said he was detained for approximately 20 days and abused, he was released, the commander threatened to kill him personally if he continued with that, yet the respondent continued to be a Protestant and nothing further happened.

The other ground for the respondent's claim is that he is a deserter from the Eritrean army, because after the four year period of time as his military service, two of which years were served in detention, the respondent found an opportunity to escape, and he escaped and left the Naval facility and secreted himself in a container, which was loaded on board a ship and came to the United States. The Court bases its conclusion that it is more likely than not that the respondent would be persecuted if returned to Eritrea, based in very large measure on the background materials, including the Department of State reports and the miscellaneous documents submitted by the respondent, which indicates that Eritrea is a very, very dangerous and bad place to be, that the government's human rights record has been bad for years and continues to be bad, and that the government has used deadly force and threatened to use deadly force against deserters, as well as other people. That people who are imprisoned are frequently tortured, which is consistent with at least portions of the respondent's testimony. So although the respondent's claim spans the possibility of religion, political opinion, nationality; that being, Ethiopian and Eritrean, and the desertion factor. It's difficult to add these items up to try to get to a more likely than not, but that's the conclusion that the Court comes to, that although it could not be pitched on one of the individual items, the most potent one, the

Court would conclude is the fact that he was a deserter from the armed forces when he left.

It is more likely than not that the respondent would be arrested. And if he's arrested, then it is more likely than not that he would be tortured if returned to his native land.

Accordingly, the following orders will be entered:

ORDERS

RESPONDENT'S APPLICATIONS for asylum, withholding of deportation under Section 241(b)(3) and withholding under the Convention Against Torture are denied as barred by the statute, and the respondent's request for deferral of removal under the Convention Against Torture is granted.

/s/ W. Wayne Stogner

W. WAYNE STOGNER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before W. WAYNE STOGNER in the matter of:

DANIEL GHIRMAY NUGUSA
A 15 575 924
New Orleans, Louisiana

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Anne Donovan

Anne Donovan (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
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August 13, 2005
(Completion Date)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60193

DANIEL GIRMAI NEGUSIE

Petitioner

v.

ALBERTO R GONZALES
US ATTORNEY GENERAL
Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

U.S. COURT OF APPEALS
F I LE D
JUL 17 2007
CHARLES R. FULBRUGE III
Clerk

/s/Carolyn Dineen King
United States Circuit Judge

REHG-14

OPPOSITION BRIEF

85

(2)

No. 07-499

FILED
FEB 15 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a person who assisted in the persecution of any other person on account of race, religion, nationality, membership in a particular social group, or political opinion is not entitled to asylum or withholding of removal. The question is whether that rule applies to persons who involuntarily assisted in the persecution of others.

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In the Supreme Court of the United States

No. 07-499

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 231 Fed. Appx. 325. The decisions of the Board of Immigration Appeals (Pet. App. 4a-8a) and the immigration judge (Pet. App. 9a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007. A petition for rehearing was denied on July 17, 2007 (Pet. App. 22a). The petition for a writ of certiorari was filed on October 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 208 of the Immigration and Nationality Act (INA or Act), 8 U.S.C. 1158 (2000 & Supp. V 2005),

provides that the Secretary of Homeland Security or the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a refugee within the meaning of the Act. 8 U.S.C. 1158(b)(1). The statutory definition of "refugee" excludes "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(B). The INA therefore precludes the Attorney General or the Secretary of Homeland Security from granting asylum to such persons. 8 U.S.C. 1158(b)(2)(A)(i); see 8 C.F.R. 1208.13(c)(1). If the evidence indicates that an asylum applicant persecuted any person, he bears the burden of proving that he did not. See, *e.g.*, 8 U.S.C. 1158(b)(1)(B)(i) (indicating that the alien bears the burden of proving that he is a "refugee"); see also 8 C.F.R. 1208.13(a); 8 C.F.R. 1240.8(d).

An identically worded provision precludes the Attorney General from granting withholding of removal to persecutors. 8 U.S.C. 1231(b)(3)(B)(i); see 8 C.F.R. 1208.16(d)(2). Likewise, the INA's implementing regulations provide that an application for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, shall be denied if the applicant is found to be a persecutor. 8 C.F.R. 1208.16(d)(2). If there is evidence that an applicant for withholding of removal under the INA or CAT engaged in persecution, the alien bears the burden of demonstrating by a preponderance of the evidence that he did not. *Ibid.*

2. Petitioner is an Eritrean citizen with dual Eritrean and Ethiopian heritage. See Pet. App. 9a. In 1994, petitioner was forcibly conscripted into military service. *Id.* at 10a. Petitioner was discharged from military service after a short time, but was recalled to service in 1998, when hostilities between Eritrea and Ethiopia escalated. *Id.* at 10a-11a. Because petitioner objected to being recalled to duty and "declined to go to the front and fight," he was assigned to a naval base. *Id.* at 11a. After several months, petitioner was arrested and taken to a prison camp. *Ibid.*

After two years of incarceration, petitioner was released from prison and returned to military service as a prison guard. Pet. App. 12a. For approximately four years, petitioner served as a prison guard "on a rotating basis." *Ibid.* As a guard, petitioner carried a gun and was generally responsible for keeping control over prisoners and preventing their escape. *Ibid.* He caught prisoners who attempted to escape, and he stood guard over such prisoners while they were kept in the sun as a form of punishment or execution. *Id.* at 15a-16a. Petitioner was aware that prisoners died when left in the sun for more than two hours. *Id.* at 13a. Petitioner was also responsible for "keep[ing] the prisoners from taking showers and obtaining ventilation and fresh air." *Ibid.*

Petitioner objected to and occasionally disobeyed orders to inflict punishment on prisoners. Pet. App. 13a. He also did some favors for prisoners, such as providing them with water or allowing them to take showers and get fresh air, and was reprimanded for doing so. *Ibid.* After approximately four years as a guard, petitioner abandoned his military service and hid himself inside a shipping container aboard a vessel bound for the United States. *Id.* at 12a, 19a.

3. An immigration judge (IJ) denied petitioner's applications for asylum and withholding of removal. Pet. App. 9a-20a. The IJ concluded that petitioner was barred from relief because he had "assisted or otherwise participated in the persecution of others" in his role as an armed prison guard. *Id.* at 15a, 16a. Although the IJ found "no evidence to establish that [petitioner] is a malicious person or that he * * * [directly] mistreated the prisoners," the IJ determined that "the very fact that [petitioner] helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from relief." *Id.* at 16a-17a.

The IJ found, however, that petitioner was eligible for deferral of removal under CAT, which (unlike asylum and withholding of removal) is available to persecutors. Pet. App. 17a-20a; see 8 C.F.R. 1208.17(a). The IJ concluded that it is more likely than not that, as a deserter from the Eritrean military, petitioner would be tortured if returned to Eritrea. Pet. App. 20a.

4. Petitioner appealed the IJ's denial of his asylum and withholding claims to the Board of Immigration Appeals (BIA or Board). The Department of Homeland Security appealed the IJ's grant of deferral of removal under CAT. The BIA dismissed both appeals. Pet. App. 4a-8a.

Given petitioner's role as an armed prison guard and the evidence regarding the mistreatment endured by prisoners, the Board affirmed the IJ's finding that petitioner was barred from asylum and withholding of removal because he had assisted in the persecution of others on account of a protected ground. Pet. App. 6a. Relying on its own precedent, the BIA noted that "[t]he fact that [petitioner] was compelled to participate as a

prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Ibid.* (citing *In re Fedorenko*, 19 I. & N. Dec. 57 (1984)). The BIA also upheld the IJ's decision to grant deferral of removal because the IJ had "found reliable evidence in the record that the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters." *Id.* at 8a.

5. In an unpublished, per curiam opinion, the court of appeals denied petitioner's petition for review. Pet. App. 1a-3a. Petitioner conceded on appeal that his subjective intent was not relevant, but he argued that the IJ should have considered involuntariness as one of multiple factors relevant to whether he assisted in persecution. See pp. 8, 10, *infra*.

The court of appeals rejected that contention. Pet. App. 2a-3a. After noting that petitioner "conceded that the prisoners were persecuted on protected grounds," the court held that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." *Id.* at 2a. Instead, the court explained, "the inquiry should focus 'on whether particular conduct can be considered assisting in the persecution of civilians.'" *Ibid.* (quoting *Fedorenko* v. *United States*, 449 U.S. 490, 512 n.34 (1981)).

Applying that standard, the court of appeals held that the record evidence did not compel reversal of the agency's finding that petitioner had assisted in the persecution of prisoners. Pet. App. 3a. The court emphasized that petitioner "worked as an armed prison guard," "knew about the forms of punishment used by his superior officer," "stood guard while prisoners were kept in the sun as a form of punishment," and "acknowl-

edged that his job description included depriving prisoners of access to showers and fresh air." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 11-29) that the statutory bar against granting asylum or withholding of removal to persecutors is categorically inapplicable to people who acted involuntarily. That contention, which petitioner did not raise in the court of appeals, has not been accepted by any court of appeals. The unpublished decision of the court of appeals is correct and does not warrant further review.

1. The persecutor bar applies to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of" certain factors. 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1231(b)(3)(B)(i). That broadly worded provision applies to "any" person who "assisted, or otherwise participated in" persecution, *ibid.*; it contains no exception for persons who acted involuntarily.

That conclusion is strongly supported by this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which held that the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, precluded *all* persons who had assisted in the persecution of others from obtaining immigration benefits, including persons who had acted involuntarily in doing so. 449 U.S. at 512-513. The DPA extended immigration benefits to certain "displaced persons," and excluded from its definition of that term persons who had, among other things, "assisted the enemy in persecuting civil[ians]." *Id.* at 495 (quoting DPA § 2, 62 Stat. 1009).

This Court was "unable to find any basis for an 'involuntary assistance' exception in the language of" that

statute. *Fedorenko*, 449 U.S. at 512. To the contrary, "[t]he plain language of the [DPA] mandates * * * [that] an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for" relief under the DPA. *Ibid.* The Court concluded that, instead of "'interpreting' the [DPA] to include a voluntariness requirement that the statute itself does not impose," the focus should be on "whether particular conduct can be considered assisting in the persecution of civilians." *Id.* at 514 n.34 (emphasis omitted). The Court therefore concluded that Fedorenko's service as an armed guard at a concentration camp constituted assistance in persecution, whether his service was voluntary or involuntary. *Id.* at 512.

Fedorenko is on point because it interpreted a comparable statutory provision: the DPA referred to persons who had "assisted the enemy in persecuting" civilians, DPA § 2(a), 62 Stat. 1009, while the statutes at issue here cover persons who "assisted, or otherwise participated in the persecution of any person," 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1231(b)(3)(B)(i). Petitioner is correct (Pet. 28) that the DPA contained a separate provision applicable to persons who had "voluntarily assisted the enemy forces * * * in their operations," DPA § 2(b), 62 Stat. 1009, and the *Fedorenko* Court noted that its decision was supported by Congress's use of the term "voluntarily" in that provision but not in the one concerning assistance in persecution. 449 U.S. at 512. But the INA, like the DPA, also contains provisions that rely on voluntariness. See, *e.g.*, 8 U.S.C. 1182(a)(3)(D)(ii) (providing that the bar to admission to the United States of any alien who was a member of a totalitarian party does not apply if such membership was "involuntary"); 8 U.S.C. 1424(d) (similar). In the

INA as in the DPA, "Congress [is] perfectly capable of adopting a 'voluntariness' limitation where it [feels] that one [is] necessary." *Fedorenko*, 449 U.S. at 512.

While petitioner now argues (Pet. 24) that the terms "assistance" and "persecution" inherently require consideration of "intent," he repeatedly conceded below that "the applicant's subjective intent is *not relevant* to whether a person assisted in persecution." Pet. C.A. Br. 31 (emphasis added); accord *id.* at 20, 40. Thus, petitioner waived that point, which appears to be central to his current position. See Pet. 24 (relying principally on petitioner's intent). In any event, petitioner has conceded that persecution occurred here, see Pet. App. 2a, and *Fedorenko* makes clear that whether a person assisted in persecution depends on the nature of his "conduct," not voluntariness. 449 U.S. at 512 n.34.[1]

Nor can petitioner (Pet. 25-26) distinguish *Fedorenko* by noting that the INA's persecutor bar provisions were enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, which Congress passed, in part, "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees [(Protocol)]." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Significantly, "[t]he origin of the Protocol's definition of 'refugee' is found in

[1] Petitioner's contention (Pet. 23-25) that statutes are presumed to incorporate a duress defense cannot be reconciled with *Fedorenko*. Duress is sometimes, but not always, a defense to *criminal* liability. See, *e.g.*, *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) (stating that Congress "may well" have intended a duress defense). As *Federenko*'s holding reflects, however, that does not mean that statutes in other contexts, such as immigration, necessarily contain implicit duress exceptions. Cf. *Dixon* v. *United States*, 126 S. Ct. 2437, 2441-2442 (2006) (noting that duress normally does *not* negate intent, but instead provides a defense to criminal liability).

the 1946 Constitution of the International Refugee Organization"—the same source as the definition Congress used in the DPA. *Cardoza-Fonseca*, 480 U.S. at 437-438 & n.20; see *Fedorenko*, 449 U.S. at 495 & nn.3-4.

Moreover, petitioner's international-law argument rests (Pet. 25-26), not on the text of any treaty, but on the *Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979). That handbook does not "ha[ve] the force of law or in any way bind[] the [government] with reference to the asylum provisions of [the INA]. Indeed, the Handbook itself disclaims such force." *Cardoza-Fonseca*, 480 U.S. at 439 n.22; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). In any event, the handbook does not purport to answer the question presented here; instead, petitioner relies (Pet. 25-26) on general statements that do not specifically address involuntariness.

Not surprisingly, thus, the courts of appeals—including the Eighth and Ninth Circuits, on which petitioner relies (Pet. 13-16)—have followed *Fedorenko* in construing the INA provisions at issue here. See, *e.g.*, *Chen* v. *United States Att'y Gen.*, No. 07-11562, 2008 WL 150205, at *3 (11th Cir. Jan. 17, 2008) ("All fellow circuits that have addressed this issue have used *Fedorenko*'s language to establish the standard for defining whether conduct amounts to assistance in persecution."); *Alvarado* v. *Gonzales*, 449 F.3d 915, 925 (9th Cir.) ("In the opinions that interpret and give shape to the persecution-of-others exceptions under the INA, this court and other circuit courts have turned for guidance to [*Fedorenko*]."), cert. denied, 127 S. Ct. 505 (2006); *Xie* v. *INS*, 434 F.3d 136, 140 (2d Cir. 2006); *Hernandez* v. *Reno*, 258 F.3d 806, 812 (8th Cir. 2001).

2. This case would not provide an appropriate vehicle for considering the question whether involuntariness provides a categorical defense to the persecutor bar. Petitioner did not advance that contention below. Instead, like the Eighth Circuit's decision in *Hernandez*, petitioner argued that compulsion is one "relevant" "factor[]" to be considered. *E.g.*, Pet. C.A. Br. 19. In this Court, however, petitioner takes the different position that compulsion is dispositive. *E.g.*, Pet. 26. Moreover, as noted, petitioner conceded in the court of appeals that subjective intent is "irrelevant," while his primary textual argument in this Court relies on intent. See p. 8, *supra*.

3. In any event, there is no circuit split on the question whether the persecutor bar is categorically inapplicable to persons who acted involuntarily. While petitioner claims (Pet. 29) that "asylum-seekers receive dramatically different outcomes based on the circuit in which they reside," he has not identified any case in which a court of appeals held that an alien who was compelled to commit acts of persecution was exempt from the persecutor bar for that reason.

a. Petitioner asserts (Pet. 13-14) a conflict with *Hernandez*, *supra*. In that case, a Guatemalan man who had been impressed into the service of a guerilla organization for 20 days argued that he had not assisted or participated in persecution because his involvement with the guerilla group had been involuntary. See 258 F.3d at 814. In finding that Hernandez had assisted in the persecution of others, the BIA relied on an incident in which a unit of the guerilla organization had rounded up and shot 15 villagers. Hernandez testified that he had aimed away from the villagers and tried to avoid hitting any of them. *Id.* at 809, 811-812, 814, 815. Hernandez's

testimony that his involvement with the guerilla group was involuntary was "uncontroverted." *Id.* at 814. The Eighth Circuit held that the BIA erred under *Fedorenko* by not considering that fact, along with "all the pertinent evidence," as part of a "particularized," multi-factor inquiry into whether Hernandez's "behavior was culpable to such a degree that he could fairly be deemed to have assisted or participated in persecution." *Id.* at 813, 814.

Because the Eighth Circuit interpreted *Fedorenko* as establishing a facts-and-circumstances test, it did not hold, as petitioner claims (Pet. 12; see Pet. 14), that "individuals coerced by threat of death or torture into participating in atrocities are eligible for asylum in the United States." Instead, the court remanded for further consideration, stating that, "[i]f the record is analyzed in accordance with the *Fedorenko* legal standard, Hernandez *may* be seen to have met his burden of proving that he did not assist or participate in the persecution of others." *Hernandez*, 258 F.3d at 815 (emphasis added); see *ibid.* ("[W]e vacate the order of the [BIA] and remand to the Board for it to conduct a full *Fedorenko* analysis.").

The Eighth Circuit's analysis in *Hernandez* differs from the Fifth Circuit's analysis in this case because the Eighth Circuit held that involuntariness is one of many relevant factors, while the Fifth Circuit held that it is irrelevant. But that does not present a conflict warranting review in this case for multiple reasons. First, petitioner's position in this Court differs markedly from *Hernandez*'s holding. Petitioner argues (Pet. 26-29) that *Fedorenko* does not provide the relevant framework for analysis, and that involuntariness alone defeats the persecutor bar. In contrast, *Hernandez* held that *Fedorenko* does provide the controlling legal standard, and

that involuntariness is only one factor to be considered along with all of the other facts and circumstances. 258 F.3d at 812-814. The Eighth Circuit's interpretation of *Fedorenko* is clearly wrong, because, as explained above, *Fedorenko* held that involuntariness is irrelevant, and that the focus instead must be on the alien's conduct. See p. 7, *supra*. Nonetheless, *Hernandez* does not go nearly as far as petitioner suggests.

The petition briefly alludes (Pet. 29) to a fallback theory consistent with *Hernandez*'s facts-and-circumstances test. Petitioner does not, however, advance any principled basis for that alternative, and the difference between *Hernandez*'s approach and the legal standard applied by the court of appeals below would not warrant this Court's review in any event. Indeed, it is far from clear that the difference between those approaches would make a difference in this case, or in many others.

The Eighth Circuit emphasized, for example, that Hernandez had remained in the guerilla organization for "only 20 days," and—in the only incident on which the BIA based its finding that he had assisted in persecution of others—he had "disobey[ed] his commander's orders to shoot directly at the villagers." *Hernandez*, 258 F.3d at 814. Even so, the court of appeals did not hold that Hernandez was necessarily exempt from the persecutor bar, but instead remanded for the Board to exercise its discretion in considering all of the facts and circumstances. *Id.* at 815. In contrast, petitioner admitted that he served as an armed prison guard for four years, and that he personally stood guard over prisoners left in the sun as a form of punishment or execution. See p. 3, *supra*. Even looking beyond the differing facts of this case and *Hernandez*, petitioner cites *no* case in which a court of appeals held that a person was exempt from the per-

secutor bar because his assistance in persecution was involuntary. Cf. *Alvarado*, 449 F.3d at 929 ("[W]ere we to assume that, as *Hernandez* posits, there are, after *Fedorenko*, some extreme situations so coercive that, on a totality of circumstances analysis, an individual cannot be said to have 'assisted or otherwise participated in' persecution he was forced to inflict, we would conclude that this case does not present such an extraordinary situation.").

b. Petitioner also contends (Pet. 14-17) that the decision below is in tension (though not in conflict) with decisions of the First and Ninth Circuits. Petitioner is mistaken, because those cases addressed significantly different issues. In *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17 (2007), the First Circuit recognized that *Fedorenko* held that "one can 'assist' in persecution even if his assistance is involuntary." *Id.* at 21. The First Circuit then distinguished *Fedorenko* on the ground that *Castañeda-Castillo* (unlike this case) did *not* involve involuntariness. *Ibid.* Castañeda-Castillo did not dispute that he had voluntarily joined an anti-terrorist unit and voluntarily participated in a mission in which others committed atrocities; instead, he argued that he was unaware that other participants intended to commit, or did commit, atrocities during the mission. See *id.* at 20. Here, in contrast, there is no question that petitioner knew that he was assisting in persecution. See Pet. App. 2a-3a, 13a, 16a-17a.

Nor did the Ninth Circuit decisions cited by petitioner (Pet. 15-16) involve questions of voluntariness. In *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247 (2004), the court held that the alien had not persecuted people on account of their ethnicity; instead, he had merely defended his town from attack. *Id.* at 1252-1253. As the court ex-

plained, "resist[ing] persecution by fighting back" is not persecution. *Id.* at 1252. Here, petitioner concedes that he took part in persecutory acts. See Pet. App. 2a.

Finally, the Ninth Circuit held in *Im* v. *Gonzales*, 497 F.3d 990 (2007), that a prison guard had not assisted in persecuting others because his actions were not "essential or integral to the persecutory acts" of others, but instead contributed in only a "trivial" way to those acts. *Id.* at 997; cf. *Fedorenko*, 449 U.S. at 512 n.34 (explaining that peripheral acts such as cutting the hair of inmates to be executed do not amount to assistance in persecution).[2] Here, in contrast, there is no dispute that petitioner's actions as an armed prison guard were integral to persecution; instead, the only question relates to the voluntariness of those actions.

4. Petitioner incorrectly claims (Pet. 20) that the question presented recurs so frequently that, in the past two years, "the federal courts of appeals have decided nearly one dozen asylum appeals that turn on the resolution of the question presented." As explained above, the published cases on which petitioner relies generally presented different questions. While the additional unpublished decisions on which petitioner relies (*ibid.*) do not describe their reasoning in detail, most of those decisions appear to have turned on whether conduct was sufficiently integral to persecution, as opposed to whether it was voluntary. See, *e.g.*, *Ghazaryan* v. *Gonzales*, 172 Fed. Appx. 139, 140 (9th Cir. 2006) (noting that, as a factual matter, the alien "was under no compulsion to

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[2] The government filed a petition for rehearing en banc of the Ninth Circuit panel's ruling in *Im* that the alien's actions did not amount to assistance in persecution. No. 05-70027 (filed Nov. 13, 2007). The court requested a response to the government's petition, which was filed on January 15, 2008. The petition for rehearing en banc remains pending.

continue her employment as a prison guard"). Thus, while the courts of appeals have considered a number of cases concerning the persecutor bar, cases turning on the question presented here are not so numerous as to warrant further review in this case, especially considering the other considerations weighing against review.

The practical significance of the issue is also reduced in this case by petitioner's CAT deferral. Deferral of removal under the CAT is not as valuable to petitioner as asylum, primarily because the CAT deferral could, in theory, be lifted if conditions changed in Eritrea to such an extent that it was no longer more likely than not that petitioner would be tortured if returned to that country. As a practical matter, however, petitioner's CAT deferral gave him much of the relief he requested.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2008

REPLY BRIEF

84

FILED
FEB 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The government acknowledges the square conflict among the courts of appeals on the question presented – whether proof that an asylum seeker was coerced to participate in persecution by threats of death and torture should be taken into account in determining whether to apply the INA's "persecutor exception." See Opp. 11 ("The Eighth Circuit [has] held that involuntariness is one of many relevant factors, while the Fifth Circuit held that it is irrelevant to application of the INA's persecutor exception.") And the government does not dispute that this legal issue arises frequently in asylum applications.

The government asserts nonetheless that certiorari should be denied on two grounds. First, it points to petitioner's supposed concession below that his "subjective intent" was "irrelevant." Opp. 8. But that argument confuses two analytically distinct legal concepts – duress and intent. This Court has recognized that a person can act intentionally and yet still be entitled to a duress defense. See, *e.g.*, *Dixon* v. *United States*, 126 S. Ct. 2437, 2442 (2006). Accordingly, any concession regarding petitioner's intent has no bearing whatsoever on the contention – expressly presented to and rejected by the court of appeals – that the fact that he was *coerced* into participating in persecutory acts should be taken into account in determining whether the persecutor bar applies to his asylum claim.

Second, the government inexplicably contends that the question presented does not encompass the issue on which the courts of appeals have divided because, in the government's view, the question presented is "whether involuntariness provides a *categorical defense* to the persecutor bar," and no court of appeals has adopted that rule. Opp. 10 (emphasis added).

In fact, the question presented expressly focuses on the correctness of the standard adopted by the court below, that involuntariness is *per se* irrelevant to the application of the persecutor bar: "whether this 'persecutor exception' prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution." Pet. i. It thus squarely puts before the Court the correctness of the Fifth Circuit's categorical rule – applied here to bar consideration of the undisputed fact that petitioner was coerced to assist his captors under threats of death and torture – as opposed to the Eighth Circuit's standard, which requires consideration of coercion in determining whether to apply the persecutor bar.

The government also addresses the merits of the issue. Although these arguments provide no basis for declining review in the face of the conflicting lower court decisions and the importance of the issue, the government's statutory analysis is wrong. The plain language and legislative context make clear that Congress never intended the INA's persecutor exception to apply to asylum-seekers forced to engage in persecutory acts. Review in this case is therefore warranted.

A. This Case Squarely Presents For Review The Acknowledged Conflict Over The Question Whether Coercion Is Relevant to the Persecutor Bar.

We showed in the petition that there is a clear conflict among the courts of appeals with respect to whether duress may preclude application of the persecutor bar and that this issue arises frequently in asylum applications. The government agrees that

there is a conflict (Opp. 11) and does not dispute the importance of the issue. Instead it asserts that "[t]his case would not provide an appropriate vehicle" for resolving the conflict for two reasons: first, because petitioner "conceded in the court of appeals that subjective intent is 'irrelevant'"; and, second, because the petition supposedly seeks review of a different question – "whether involuntariness provides a categorical defense to the persecutor bar." Opp. 10. These arguments are entirely without merit.

1. As the government recognizes, petitioner argued in the court below "that compulsion is one 'relevant' 'factor[]' to be considered" in deciding whether to apply the persecutor bar. Opp. 10 (quoting Pet. C.A. Br. 19). The court of appeals, as the government again acknowledges, considered and rejected that argument: "the court held that "*[t]he question whether an alien was compelled to assist authorities is irrelevant*, as is the question whether the alien shared the authorities' intentions." Opp. 5 (quoting Pet. App. 2a) (emphasis added). Accordingly, the issue of the relevance of coercion under the persecutor exception plainly was explicitly raised and decided below.

Petitioner's supposed concession of the "irrelevance" of his "subjective intent" has no bearing on whether the coercion question is properly presented, because the issue of "subjective intent" is analytically distinct from coercion. The claim of asylum seekers, like petitioner, who argue that coercion *is* relevant under the persecutor exception is that they were coerced into engaging in admittedly intentional acts of persecution against their will.

This distinction between "voluntariness" and "intentionality" is recognized in the criminal law defense of duress:

> Like the defense of necessity, the defense of duress does not negate a defendant's criminal state of mind when the applicable offense requires a defendant to have acted knowingly or willfully; instead, it allows the defendant to "avoid liability * * * because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present."

Dixon v. *United States*, 126 S. Ct. 2437, 2442 (2006) (quoting *United States* v. *Bailey*, 444 U.S. 394, 402 (1980)). Under the criminal law, therefore, a defendant may have engaged in every element of an offense – including acts that were "knowing" or "willful" – but nonetheless be excused from liability by the defense of duress. Similarly, an asylum seeker may have intentionally participated in or assisted persecutory acts – and therefore have acted with "subjective intent" – but nonetheless be protected from operation of the persecutor bar because those actions were coerced by threats of injury or death. Any concession regarding petitioner's subjective intent is thus wholly irrelevant to his claim that coercion must be considered in determining whether to apply the persecutor bar.[1]

For the same reason, the government is wrong in characterizing our argument that "[t]he plain mean-

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[1] The government's argument about a "concession" regarding intentionality is misplaced for a second reason. The court of appeals explicitly held that intent is also irrelevant to the application of the persecutor bar: "[t]he question whether an alien was compelled to assist authorities is irrelevant, *as is the question whether the alien shared the authorities' intentions*." Pet. App. 2a (emphasis added). The lower court's explicit holding makes any concession completely irrelevant.

ing of the word 'persecution' requires purpose and intent on the part of the actor" (Pet. 24), as an assertion that subjective intent is relevant to the resolution of this case. Opp. 8. We simply were explaining why the plain meaning of the term "persecution" requires consideration of coercion – because participating in or assisting with "persecution" requires "hostility or malignity." Pet. 24 (quoting *Oxford English Dictionary* (2d ed. 1989)).

Even though the two issues are analytically distinct, however, the Court's resolution of the coercion issue is likely to provide useful guidance to the lower courts regarding the relevance of subjective intent to application of the persecutor bar, an issue as to which they also have reached conflicting determinations. See Pet. 14-17. The analysis employed by the Court in determining whether the statutory term "persecution" is negated by coercion inevitably will shed light on how to resolve the claim raised in these cases that an individual may not be found to have engaged in "persecution" if he did not know that his actions were assisting in persecution. Addressing the meaning of "persecution" here thus likely will enable the courts of appeals themselves to resolve the conflict regarding intent.

2. There also is no substance to the government's contention that the petition presents a question – "whether involuntariness provides a *categorical defense* to the persecutor bar" (Op. 10 (emphasis added)) – distinct from the issue on which the circuits are divided. The question presented in the petition is:

> Whether this "persecutor exception" prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death

> or torture to assist or participate in acts of persecution.

The court below answered that question in the affirmative, applying *Bah* to conclude that "[t]he question whether an alien was compelled to assist authorities is irrelevant." Pet. App. 2a (citing *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) ("forced" participation "not relevant")). In contrast, the Eight Circuit answered that question in the negative in *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001), holding that application of the persecutor bar *does* require that the BIA take into account that the asylum seeker's behavior was compelled.

The question presented squarely poses the issue whether the categorical rule adopted by the court below was correct. That determination differs from the Eighth Circuit's rule and this case is an excellent vehicle to resolve the question whether the court adopted an erroneous legal rule *in this very case*.

3. Resolution of the question presented is also plainly relevant to the outcome in this case, despite the government's bizarre – and wholly unsupported – speculation that "it is far from clear that the difference between [the Fifth and Eighth Circuit's] approaches would make a difference in this case." Opp. 12. The government does not (nor could it) dispute "that [petitioner] was compelled to participate as a prison guard." Pet. App. 6a. Nor does the government dispute that the Fifth Circuit rejected petitioner's appeal because "the question whether an alien was compelled to assist authorities is irrelevant." Pet. App. 2a (citing *Bah*, 341 F.3d at 351). If petitioner had filed his appeal in the Eighth Circuit, that court, in contrast with the court below, would have considered the fact that he was coerced as relevant to de-

termining whether he was "culpable to such a degree that he could fairly be deemed to have assisted or participated in persecution.'" *Hernandez*, 258 F.3d at 813.

To be sure, there is no *guarantee* that consideration of coercion would have led to a different result regarding the application of the persecutor bar in this case. But that will be true in every case in which review is sought from the Fifth Circuit's categorical standard – surely the government does not mean that review by this Court of the coercion issue is available only when the government seeks to overturn a decision granting asylum based on the Eighth Circuit standard but never available when an asylum applicant challenges the categorical standard.

Moreover, the facts here are compelling. The Immigration Judge found "no evidence" that petitioner "is a malicious person or that he was an aggressive person who mistreated the prisoners." Pet. 9 (citations omitted). Permitting consideration of coercion in this case would therefore likely tip the scales against application of the persecutor bar.

The government suggests that "[t]he practical significance of the issue is also reduced in this case by petitioner's [Convention Against Torture (CAT)] deferral." Opp. 15. As we have explained (Pet. 9 n.4), however, petitioner cannot become a lawful permanent resident of the United States under a CAT deferral. In fact, deferral of removal "[d]oes not confer upon the alien *any* lawful or permanent immigration status in the United States." 8 C.F.R. § 1208.17(b)(1)(i) (emphasis added). Without any legal right to remain in the country, petitioner may be *detained at any time* by the Immigration and Naturalization Service. 8 C.F.R. § 1208.17(c). He also may be removed at *any* time to *any* third country "where he

or she is not likely to be tortured." 8 C.F.R. § 1208.17(b)(2) (emphasis added). Thus the proper resolution of the question presented in this case carries tremendous practical significance for petitioner and other similarly situated asylum applicants.

4. Finally, the government does not dispute that recent patterns in asylum claims demonstrate that cases like petitioner's are increasingly common, likely amounting to hundreds or even thousands of cases each year in the United States. See Pet. 18-20. In fact, over 1,000 of the approximately 41,000 new asylum applications filed in 2006 were filed by citizens of Ethiopia; over 500 were filed by citizens of Eritrea.[2] Given the ubiquity of forced recruitment of men and boys into the armed conflict in that region – well demonstrated by petitioner's own story – it is likely that resolution of the question presented was dispositive in many of those cases.

The government asserts only that cases among the courts of appeals are "not so numerous as to warrant further review in this case." Opp. 15. That assertion ignores the fact that the large majority of the tens of thousands of annual asylum claims never make their way to the courts of appeals,[3] and that resolution at the administrative level of the question presented will frequently be dispositive.

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[2] See Dep't of Homeland Security, Office of Immigration Statistics, *2006 Yearbook of Immigration Statistics*, at 40 tbl.14, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf.

[3] See *2006 Judicial Business of the United States Courts*, tbl.B-3, *available at* http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf (noting that of over 220,000 total immigration cases in 2006, only 12,000 petitions for review were filed).

B. Congress Did Not Intend The INA's Persecutor Exception To Apply To Those Asylum-Seekers Who Have *Involuntarily* Assisted Or Participated In Persecution.

The presence of an undeniable circuit conflict – coupled with the undisputed frequency with which aliens apply for asylum from countries torn by violent civil strife involving persecution – establishes that review in this case is warranted. The government suggests that the Fifth Circuit's categorical rule is so clearly correct that this Court's intervention is unnecessary. To the contrary, the flaws in the lower court's analysis are yet another factor that weigh in favor of granting the petition.

Despite the government's insistence (Opp. 6-9), this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), does not provide the proper framework for interpreting the INA's persecutor exception. As we explained in the petition, this Court's decision in *Fedorenko* was based on the specific language of the long-expired Displaced Persons Act (DPA), language that Congress did *not* include in the persecutor exception at issue in this case. See Pet. 28.

The provision of the DPA considered in *Fedorenko* excluded from the definition of eligible displaced persons "individuals who had 'assisted the enemy in persecuting [civilians]' or had '*voluntarily* assisted the enemy forces * * * in their operations * * *.'" 449 U.S. at 495 (emphasis added). This Court reasoned that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the perse-

cution of civilians ineligible for visas." *Id.* at 512 (emphasis in original).

The government argues that because the INA, like the DPA, "also contains provisions that rely on voluntariness," Opp. 7-8, the same principles of statutory construction apply here. That assertion ignores highly relevant differences between the two statutes. The "provisions that rely on voluntariness" that the government cites here were passed as part of the *original* Immigration and Nationality Act of 1952, and *not* as part of the Refugee Act of 1980 that included the persecutor exception at issue here. Moreover, the cited provisions are codified in entirely different sections of Title 8. In *Federenko*, by contrast, the provision of the DPA including the modifier "voluntarily" was separated from the persecutor exclusion by a single line. Indeed, the two clauses were codified as consecutive sub-parts to the same subsection of the same statute. See 62 Stat. 3051-52. Congress's use of the word "voluntarily" in a remote provision of Title 8 enacted in a different statute 28 years earlier and codified 51 sections away plainly lacks the same interpretive relevance.[4]

Moreover, as we explained in the petition (at 24-27), the statutory history and plain language of the INA's persecutor exception demonstrate the Congress never intended it to apply to asylum-seekers

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[4] The government notes that the Eighth Circuit in *Hernandez*, rested its decision on *Fedorenko*, intimating that the Eighth Circuit's reasoning somehow undermines the conflict or the relevance of the conflict to the resolution of this case. Opp. 11-12. But the Eighth Circuit's reliance on *Fedorenko* does not vitiate the conflict between its approach and that of the court below. Indeed, it demonstrates that even the government's reasoning based on *Fedorenko* is not persuasive. See Pet. 29.

who have been compelled under threat of torture and death to participate in persecution. The government argues that because the definition of "refugee" found in the 1967 Protocol was based in part on the definition found in prior international legal documents on which the DPA was based, this Court should rely on the DPA and *Fedorenko* directly to interpret the Refugee Act. Opp. 8-9.

But this Court has already recognized that "the U.N. Handbook [interpreting the 1967 Protocol] provides some guidance in construing the provisions added to the INA by the Refugee Act." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). That guidance, along with the plain meaning of the word "persecution" and the legal background against which Congress legislated, unequivocally indicates that coercion *is* relevant to application of the INA's persecutor exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2008

JOINT APPENDIX

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(5)

No. 07-499

FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

General Docket

US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 06-60193

Filed: 3/7/06

Nsuit: 0

Negusie v. Gonzales

Appeal from: Board of Immigration Appeals

3/7/06	Agency case docketed. Petition for review filed by Petitioner Daniel Girmai Negusie. [06-60193] ROA due on 4/17/06. (kkf) [06-60193]
3/8/06	Agency case docketed. Petition for review filed by Petitioner Daniel Girmai Negusie in 06-60194. [06-60194]
3/8/06	Additional Appeal docketed. [06-60193, 06-60194] (kkf)
5/15/07	Opinion filed. Mandate pull date is 7/9/07 in 06-60193, in 06-60194.
5/15/07	Judgment entered and filed. [06-60193, 06-60194] (rmf)
7/17/07	COURT Order filed denying petition for rehearing in 06-60193, 06-60194.

MAY 10, 2005 TRANSCRIPT (EXCERPTS)

Q. All right. Raise your hand to the extent that you can, please. Do you solemnly swear or affirm under penalty of perjury that the testimony you're about to give this Court today will be the truth, the whole truth, and nothing but the truth?

A. I swear in the name of God.

Q. Thank you. You may be seated. Here I am not using the microphone. As you testify, I need you to talk into the microphone and speak loud enough that the interpreter can hear you.

A. Okay.

Q. Thank you.

JUDGE TO MS. ROBINSON

Q. Your witness.

A. Your Honor, may I adjust the respondent's chair, so he is closer to the mike. I'm not sure if he can do it with his handcuffs on.

Q. Certainly.

A. Thank you. May I proceed?

Q. Yes. Proceed.

A. Thank you.

MS. ROBINSON TO MR. NUGUSA

Q. What is your name?

A. Ghirmay Nugusa.

Q. What is your first name?

A. Daniel. [28]

Q. When were you born?

A. Do you mean my birth date or the country of birth?

Q. The day that you were born, the date.

A. 1-15-1976.

Q. Okay. And where were you born?

A. Addis Ababa, Ethiopia, Addis Ababa.

Q. And where was your mother born?

A. In Eritrea.

Q. And where was your father born?

A. Ethiopia, Addis Ababa.

Q. And what is your nationality?

A. On my father's line, I'm Ethiopian. On my mother's line, I'm an Eritrean.

Q. Where did you grow up?

A. Addis Ababa.

Q. Did you go to school there?

A. Yes.

JUDGE TO MS. ROBINSON

Q. Just a second. Is he a dual national? Because he said on one on his father's line and on the mother's line.

A. He's a split heritage, Your Honor. That's what we're trying to establish, that his mother is Eritrean, his father is Ethiopian. His citizenship is a separate question.

Q. Okay. Go ahead.

A. Thank you. **[29]**

MS. ROBINSON TO MR. NUGUSA

Q. What year did you finish school?

A. In 1994.

Q. Okay. Then what did you do?

A. Well, after I graduated from school in 1994, I went to Asav (phonetic sp.) in 1995.

Q. Where is Asav located?

A. Asav is located in Eritrea.

Q. And what year did you arrive in Asav?

A. In 1995.

Q. Why did you go to Asav?

A. First of all, Asav is my mother's country, and at the same time, I went to get a job.

Q. Okay. Did you find work in Asav?

A. Well, I did not get a permanent job; however, I used to work a different, used to perform different kinds of jobs.

Q. And how long were you doing these different types of jobs?

A. Between four to five months.

Q. Then what happened?

A. One day, I went to a movie theater.

Q. And what happened?

A. Well, after the movie was over, the theater had been surrounded by the Eritrean soldiers. **[30]**

Q. Go on. Please continue.

A. Then as soon as I went, and I went out, and I closed the door after us.

Q. What did the Eritrean soldiers do?

A. Then all of us who went out of the movie theater were terrified, and then some of us ran, and they caught, they apprehended some of, they apprehended some of us. And the rest of the people who escaped, they tried to catch them, but they escaped even though the police or the soldiers fired after them, they could not apprehend them. However, those of us who were apprehended were hand-tied by rope, and then they put us aside. They kept us aside.

Q. So you were arrested by the military?

A. Then, after they, they tied us, they tied us with the rope, at the gunpoint, we were headed towards a truck, and we were loaded on the truck, and they took us away.

Q. Did they say anything to you?

A. Then they took us in a van hall, where there is no sufficient ventilation. A hall which is, with a high degree of temperature, and where there was no cooling system or ventilation.

Q. Oh, did the soldiers say anything to you during your arrest?

A. They did not give us a chance to talk. They did not ask me, ask us anything. They simply took us to the hall and [31]

closed the door after us.

Q. Do you know why you were arrested?

A. I didn't know anything.

Q. And where did they take you?

A. Then, the next morning, they loaded us into a Mercedes truck, and then they took us to a place called, Eyul (phonetic sp.).

Q. Can you—

A. Eyul.

Q. What is Eyul?

A. Eyul is in the Eritrean small village, where they produce salt.

Q. And what did you do there?

A. Then they divided us into a group of 20 people, and each group, for each group, we were given a tent. And they told us that the purpose of them, for them to bring here was to dig out the salt.

Q. They put you to work?

A. Yes.

Q. What type of work did you do?

A. Digging the salt and loading the salt onto the tractor.

Q. How long did the military keep you there?

A. One month.

Q. And how were you treated during that month? **[32]**

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO INTERPRETER

Q. Continue, please.

A. Okay. Should I continue. Good.

MR. NUGUSA TO JUDGE

Q. Well—

MS. ROBINSON TO JUDGE

Q. Should I repeat the question, Your Honor? I'm sorry.

A. If the interpreter needs it. It's the answer that matters.

Q. Okay. Just checking.

INTERPRETER TO JUDGE

Q. Okay. I can do it. Okay.

A. Okay.

MS. ROBINSON TO INTERPRETER

Q. Okay.

MR. NUGUSA TO JUDGE

Q. We were treated in a very bad manner. The room or the place was very hot. There was very poor sanitation. There were flies all around, like flies biting us during the night. The place was very crowded, very hot. There was malnutrition. Even if we asked them to improve the situation, they used to beat us. **[33]**

MS. ROBINSON TO MR. NUGUSA

Q. Okay. Did you ever try to escape?

A. I did not try to escape, but there were some of my friends who were, who managed to escape.

Q. What happened to the people who tried to escape?

A. Well, like only five, five people amongst them had, were managed to escape. The rest of the people were rounded up and apprehended. And then, even though, by the time they escaped, they simply fired to the sky, the soldiers fired to the sky and were able to round some of them except five of the people. Five

of them escaped. And those, the people who were apprehended were tied, and they were kept in the sun for three days without food and water.

Q. Then what happened?

A. Then the authorities came.

Q. And what did the authorities do?

A. Then the authorities gave us a warning, saying that from now on, all this, no one of you can move from this place. You have to stay here. And then we protested, saying that if we are not criminals, why do you keep us here. And if we did any crime, take us to the courts of law, so that the court would see our case and decide on us. And there were even some Ethiopians. And those Ethiopians said, please send us back to our country. They said no, we don't know anything about you, and we don't know anything about anyone else. Keep, you have to be [34]

here. You have to remain. Don't say anything. That's what they said.

Q. Did anyone try to escape after that?

A. Well, at this time, no, no one tried to escape, because they tried to make things tight. And the surrounding area was very tight, and they kept, they controlled things very well. And we were terrified, and we didn't, there was no attempt on our part to escape at this time.

Q. What happened next?

A. Then, we were like, they took 20 of us and loaded us on a Mercedes truck, and they took us to the police station.

Q. And then what happened?

A. And then they gave us the opportunity of taking shower that day in a month's period of time. And then they told us that we would be taken to Sowa (phonetic sp.) military training camp.

Q. So at this point, you were drafted into the military?

A. Yes.

Q. What year was that?

A. In the same year, 1995.

Q. And they took you to Sowa?

A. Yes.

Q. What is Sowa?

A. Sowa is a training center. [35]

Q. What did you do at Sowa?

A. We, we took military courses.

Q. How long were you at Sowa?

A. Six months.

Q. What happened after six months?

A. We were sent to different locations. Mine was—

INTERPRETER TO JUDGE

Q. Your Honor, may I ask the respondent to repeat the name of the place? Because I'm not familiar with that.

A. Yes.

MR. NUGUSA TO JUDGE

Q. We were assigned to different locations, and mine was Heili Barieri (phonetic sp.). I was sent to Heili Barieri.

MS. ROBINSON TO MR. NUGUSA

Q. And where is Heili Barieri?

A. Asav, in Asav.

Q. Is that a military unit?

A. It's a military camp.

Q. Is it part of the navy?

A. Yes.

Q. And what job did they assign you to?

A. Well, after I reached at that place, and I stayed for three days, they informed, informed me that I would be involved in the military metal, military metal training.

INTERPRETER TO JUDGE [36]

Q. Your Honor, I don't have—

A. Military mittle or metal?

Q. Metal. That is what he said. Okay. He said (indiscernible) military heavy metal.

MS. ROBINSON TO MR. NUGUSA

Q. Can you explain what that was?

A. Like, you know, training on the heavy machineries, machine guns. Like, you know, cannons and Zu 23 type armaments.

Q. Okay. And what happened when you were done with that training?

A. Then after six months period, training period, we were assigned to the boats that loaded those types of heavy armaments or machine guns.

Q. What did you do on the boats?

A. I was assigned as a person who fires the metal.

Q. What exactly did you do? Can you explain?

A. Well, I, along with my other colleagues, we were assigned on the boats, our duties were to fire those machine guns and to control the sea in that area.

Q. So your job was to watch the sea?

A. Yes.

Q. How long did you do that?

A. One year.

Q. Then what did you do?

A. Then I finished my military duty, and then they [37]

discharged me.

Q. What did you do after they discharged you?

A. Then after getting discharged from them, I took like one week rest, and then I got a job on the ship, ship.

Q. What did you do on the ship?

A. I was a painter on the ship.

Q. How long did you paint ships?

A. Six months.

Q. And what happened next?

A. Then, as I was working on the ship, then the Ethio-Eritrean war broke out. And at this time, the Eritrean government posted notices everywhere.

Q. What did the notices say?

A. The notice said, those of you who were discharged from the military services should come and report in Asav—

INTERPRETER TO JUDGE

Q. Then name of the place, Your Honor, he said there is a name of a place in Asav, but I'm not familiar with the name. So may I ask him to repeat?

A. Yes.

MR. NUGUSA TO JUDGE

Q. Well, they, they, the notice said that every former member of the military service who were, who were discharged from the military, should report on 4-26-1995, at Asav in a particular location called Indemikial (phonetic sp.). **[38]**

JUDGE TO INTERPRETER

Q. Wow. Spelling?

A. Indemikial?

Q. Yes.

A. Okay.

MR. NUGUSA TO JUDGE

Q. Indemikial is a Tigrinya terminology. It's a, so I don't know how to write in Latin alphabet. It's only in Tigrinya.

A. What's the first letter?

Q. In Amharic, it's Eh (phonetic sp.), the Eritrean "E" is a short like one of the leg of the letter is shorter than then that of Amharic.

A. Is it Endelikai (phonetic sp.)?

Q. Endemikial.

A. Endemikai?

Q. Yes. All right.

JUDGE TO MS. ROBINSON

Q. Go ahead.

A. Thank you.

MS. ROBINSON TO MR. NUGUSA

Q. Did the notices give any other instructions?

INTERPRETER TO JUDGE

Q. Okay. Okay. Your Honor, I'm sorry, I did a mistake, here. Now he said that it was, the notice said that we **[39]**

have to report on 4, that's the month of 4, on the day 26, 4, 1998. But previously I said 1995. That is what I wrote here.

A. Good.

Q. Right now, he said 1998.

MR. MCKLUSKEY TO JUDGE

Q. Your Honor, can I just clarify?

MR. MCKLUSKEY TO INTERPRETER

Q. Is that a—

A. I'm sorry?

Q. Is the error that you said 8 instead of 5, or did he say 5 last time and—

A. Yes. Well, when I said, I wrote here 4-26-95, but now when he repeated, he said it 4-26-98.

INTERPRETER TO JUDGE

Q. May I ask him, Your Honor, again to—

JUDGE TO MR. MCKLUSKEY

Q. Well, in either event, one way or another, the interpreter realized that he had said the wrong thing, or the respondent said it. And whether he changed—

Q. Well, that's just, I wanted to make sure it was a translation error and not a error in that the translation was correct.

INTERPRETER TO JUDGE

Q. Yes. Well, I can, I, I mean, Your Honor, if you allow me, he can repeat it, I mean, I mean, if— **[40]**

A. All right. Ask him again.

Q. Okay. Good.

MR. NUGUSA TO JUDGE

Q. Yes. He said that the month was 4, the date was 26, and the year was 1998.

MS. ROBINSON TO MR. NUGUSA

Q. What else did the—

INTERPRETER TO JUDGE

Q. Well, he said that, interpreter, please inform the Court that you made a mistake. Yes, Your Honor, I made a mistake. It was, it's, it's, I said '95.

Q. Okay.

MS. ROBINSON TO INTERPRETER

Q. Thank you.

A. I apologize for that.

MS. ROBINSON TO MR. NUGUSA

Q. What else did the notice say?

A. Well, the, let me repeat what the notice had said, the notice had said that every soldier who was, who was discharged from the military duty must report at a place called Indemikial, which is located in Asav, on 4-26-1998. Anybody who would not report on this day, would be penalized or would be punished. That is what the notice said

Q. Did you go to the place that, where it told you to go? [41]

A. Yes. Because I knew that I would be punished if I would not, if I did not obey the order. So I reported, and I went there.

Q. What happened when you got there?

A. By the time I reached there, I saw a line of cars waiting for us.

Q. What happened next?

A. We were ordered to be loaded onto the cars, and then the journey started.

Q. Where did they take you?

A. Asmara (phonetic sp.).

Q. What did you do once you arrived in Asmara?

A. After we entered Asmara, for four days, we stayed in Asmara. They gave us a place to stay in Asmara for four days, and we stayed there for four days.

Q. What was it like to be half Ethiopian in the Eritrean military?

A. Well, being half Ethiopian, it has a bad picture among the Ethiopia, Eritrean military. Even they, they have a connotation for us. They call you Amharicum (phonetic sp.). That is how they call us.

JUDGE TO MR. NUGUSA

Q. Amhari what?

A. When they call you, come Amhari, that is the connotation they used to give us. **[42]**

MS. ROBINSON TO MR. NUGUSA

Q. What does Amhari mean?

A. It means, it means Amara (phonetic sp.). Since I'm an Ethiopian from by father's side, they call me Amara.

Q. Is that a derogatory term?

A. Yes.

Q. How could they tell that you're Ethiopian?

MR. MCKLUSKEY TO JUDGE

Q. Your Honor, I just I would just object that he's already, I believe he said earlier, he's half Ethiopian, half Eritrean, and I don't know if it actually what citizenship he is.

A. He didn't say what citizenship. He said he was nationality.

JUDGE TO MS. ROBINSON

Q. So did you just, was the question citizenship or nationality?

MR. MCKLUSKEY

Q. Well, she just said how will they know you're Ethiopian?

MS. ROBINSON TO JUDGE

Q. I'll clarify the question, Your Honor.

A. All right.

MS. ROBINSON TO MR. NUGUSA

Q. How could they tell that your nationality is half Ethiopian? **[43]**

A. Well, when I crossed the border, the register me, and I get the (indiscernible) because of my mother, on my mother's side. And when I was crossing the border, they registered my name, and they asked me if I was half Ethiopian and half Eritrean, yes, in that way, they register me. And that file had been taken all the way to the military. So that's how they identify me.

Q. Okay. Were there any other ways that you were treated differently in the Eritrean military?

A. When you say treated differently, what do you mean?

Q. Did they treat you differently, because you're half Ethiopian? Or did they treat you differently than the soldiers who were only Eritrean?

A. Well, it was like verbal attack, usually.

Q. Okay. And you said you were in Asmara for four days; is that correct?

A. Yes.

Q. And then what happened?

A. Then after four days, we were assigned to our own different places.

Q. And where were you assigned?

A. I was assigned to Misawa Hailavaharia (phonetic sp.) .

Q. And what happened when you arrived at Misawa? [44]

A. Then as soon as we were taken to Misawa, there was no accommodation prepared for us, and we simply slept on the plain field. And then the next morning, the commander of Hailavaharia gathered us and informed us that now the war has started between Ethiopia and Eritrea. So you must be ready, and you must, you would be given the necessary equipments or armaments for the war, so you have to be ready in order to fight, to participate in the war. That is what he said to us.

Q. And then what happened?

A. Then we were assigned to different groups, and then we were given the arms. And as time, then he said, you have to get ready to fight, so you are, you are going to the war front. Then I objected, saying that, no, I would decline going to the war front, because Ethiopians are my brothers and how can I fight my brothers. He said, no, you have to fight, because this is your obligation.

Q. Who did you say that to?

A. He is my close supervisor, Colonel Makunan (phonetic sp.).

JUDGE TO INTERPRETER

Q. Are you saying colonel?

A. Colonel, colonel. Like Colonel.

MS. ROBINSON TO MR. NUGUSA

Q. And what did Colonel Makunan say when you objected? [45]

A. He said, he said that you must go. This is a duty, this is an obligation, this is what you should perform. And still I declined, and I still, I said no.

Q. Well, why did you object?

A. Because Ethiopians are my brothers.

Q. And then what happened?

A. Then I was assigned on the navy base and stayed there for sometime, working on the base.

Q. For how long were you working on the base?

A. Starting from 5, the month, fifth months of 1998, up to 1999, I had been working on the base, even though I cannot correctly remember the dates.

Q. And then what happened?

A. Then on the seventh month in 1999, one of my fellow soldier came and wake me up from where I was sleeping.

Q. And what happened?

A. Then he said that I am ordered to come and take you. And I asked him, why do you take me? I don't know. I was ordered, so please follow me. Then I thought that he was trying to take me to some kind, to assign me or to take me to some kind of other duty. And then I followed him. And when I followed him, he took me to the, to prison.

Q. Where was the prison located?

A. It's located in that Hailavaharia camp.

Q. Did he ever tell you why he was taking you to [46]

prison?

A. No, he did not tell me.

Q. Why do you think he was taking you to prison?

A. I don't know why.

Q. And then what happened, or what happened once he took you to the prison?

A. Then he, in fact, took me to the prison supervisor or prison manager. And then the prison manager handed me to the prison guards. And the prison guards took me to a cell, a dark cell, which is called shela (phonetic sp.), shela, which is called shela. And in that prison cell, I was arrested alone for six months.

Q. You were kept in the prison cell alone for six months.

A. Yes. For six months, without getting out of that place for six months.

Q. Then what happened?

A. Then I was transferred to another cell, where there were other prison mates, but that room was very hard.

Q. And what was it like in prison there?

A. First of all, that area, the city, itself, or the area, itself, is a very hard region, is in the very hard region, and the building had been built from stone and bricks. There was no cooling system, no ventilation, no windows, so, you know, every time you have to, you know, sit like without clothes on [47]

you, because you cannot tolerate the heat. So that was the condition in the prison.

Q. How long were you in prison there?

A. For two years.

Q. Can you describe what a typical day in prison was like for you?

A. Do you mean the history?

Q. Just describe what you did on your average day in prison.

A. After staying, after being kept in that cell for six months, they transferred me to another room where there were other prison mates, and I stayed there for one month. At that time, we were afraid to communicate with each other, and even though I tried to gather some information from other prison mates, they were also afraid to relate any kind of information of their own to me. And, you know, I was just refrained from asking further questions, seeking further information. And I stayed there at only for one month.

Q. And what did you do while you were in prison?

A. Then after I stayed there, they told me that I would be assigned to the forced labor, labor work, and then I continued to do the forced labor work.

Q. What type of work did you do?

A. Unloading the logistic of the military logistic, and also cleaning, and it was very labor intensive job. And if [48]

you were reluctant to perform, or if you declined to perform that duty, you were subject to punishment.

Q. How many hours a day did you work?

A. Well, there was no limit to the hour. As soon as you finished the job, you would get rest.

Q. Did you ever ask anyone else why you were being held there?

A. Well, I always raised this question, but no one gives me the answer.

Q. Were you ever punished while you were in prison?

A. Yes, I was punished for two weeks.

Q. Why were you punished?

A. Well, while I was in prison, there were some other prisoners who were brought there in the year 2000. Those prisoners were the followers of the Protestant religion. And since I was lonely or I had, since I was attacked by the loneliness in that prison, and nobody was communicating with us, with me, I approached this Protestant prisoners, since they were the followers of God, they, I tried to communicate with them.

Q. And you were punished for communicating with them?

MR. MCKLUSKEY TO JUDGE

Q. Your Honor, I guess I'm just going to object. It seems were asking, all she's doing is repeating some of the same answers that he's just gives. It's, I'm not sure if that's really a question, or she's testifying, but— **[49]**

JUDGE TO MS. ROBINSON

Q. Where are you going with that, Counsel?

A. I'm just trying to get at the reason why he was punished in prison. I wasn't sure if it was clear from his answer.

Q. Okay. Go ahead.

MS. ROBINSON TO MR. NUGUSA

Q. Can you explain again why you were punished?

A. Well, they found me while I was communicating or talking to these prisoners. That's why they punished me.

Q. Okay. And what was your punishment for talking to the prisoners?

A. They roll me, they used to roll me on the ground in the sun, hot sun.

Q. How long did you have to roll on the ground in the sun, hot sun.

A. For two weeks.

Q. Why did they make you roll?

A. Well, they, the rolling is one mechanism of the punishment, and they would, they hold the stick on their hand, and they follow you while you are rolling. And if you stop rolling, the result, the consequences would be beating you. So just for, just for the sake of talking to those people or communicating with those people, that was the consequence, the consequence was rolling me as a punishement. **[50]**

Q. How many hours a day did you have to stay in the sun?

A. Well, that is, depends on their wish, sometimes two hours, sometimes three hours.

Q. Were you beaten during your punishment?

A. Yes.

Q. Where did they beat you?

A. On my back.

Q. Why did they beat you?

Q. First of all, it was extremely hot, it's a hard region and the (indiscernible) of the sun is also hot. And the way they roll you on the sun, the sun is very hot, and you get tired and you get shortness of breath. Then when you get tired and shortness of breath and stop, they come and beat you to continue rolling.

Q. Okay. Were you ever punished for anything else after that?

A. No.

Q. Were you afraid for you life while you were in prison?

A. I was afraid and scared every time.

Q. What were you afraid of?

A. For them not to take me out and shoot and me and kill me.

(OFF THE RECORD) [51]

(ON THE RECORD)

JUDGE TO MS. ROBINSON

Q. Please continue.

A. Thank you, Your Honor.

MS. ROBINSON TO MR. NUGUSA

Q. What happened after you spent two years in prison?

A. Do you mean outside of prison, or inside prison?

Q. After you spent two years in prison, then what happened?

A. After two years prison time, and then I went to my job to work. And while I was working, I was called back by the police station officer.

JUDGE TO MR. NUGUSA

Q. By whom?

A. Police station officer or police station manager.

MS. ROBINSON TO MR. NUGUSA

Q. What year did they release you from prison?

INTERPRETER TO MS. ROBINSON

Q. I'm sorry, what day?

A. What year?

Q. Okay. Good.

MR. NUGUSA TO MS. ROBINSON

Q. In 2001.

JUDGE TO MS. ROBINSON

Q. Wait a minute. Was the question when did they [52]

release you from prison?

A. What year did they release you?

MS. ROBINSON TO MR. NUGUSA

Q. And how did you learn that you were being released?

A. Well, and then I was called by the prison authority and informed the fact that I would be released from jail. And at this time, even though I was very happy inside, I controlled my happiness and started asking questions, saying that why was I ar-

rested from the very beginning. And then he said, I don't know why you were arrested.

Q. When you think about it now, why do you believe they kept you in prison for two years?

A. Because I refused to go to the war front.

Q. Is that a crime in Eritrea?

A. Well, I was lucky to live or to survive. This is a crime that would lead you to execution or whose final sentence would be death.

Q. Okay. After you were released, what did your colonel tell you, after he told you he was releasing you?

A. Then the colonel did not, said that I would again resume my duties as a prison guard and also in the surveillance, and also participate in the surveillance of the base.

Q. Okay. What religion are you?

A. Protestant. [53]

Q. What church do you belong to?

A. Muluongen (phonetic sp.).

Q. Have you been Protestant your whole life?

A. No.

Q. What was your religion before?

A. Orthodox.

Q. And why did you convert?

A. Well, I have come to know that the Protestant religion is the correct and true religion.

Q. How did you convert?

A. I was converted inside prison.

Q. And how long have you been a Protestant?

A. Well, I learned about the religion for, since a long time, long time ago. But I started learning more and more deep inside the religion, since two years now.

Q. When did you first learn about the religion?

A. Well, when I was a student, I used to know about the Protestant, and sometimes I used to go to the church. But I got the deep inside of the religion, while I was in prison.

Q. Who taught you about the religion in prison?

A. The Protestant prisoners in the prison.

Q. Why were they in prison?

A. Because of their religion, their faith.

Q. Do you remember their names?

A. Yes. I know, or I remember the names of the, all [54]

of the prisoners.

Q. What were the names of the people who taught you about Protestantism?

A. There were ladies and gents, do you know the names of the gents or the name of the ladies?

Q. Both.

A. Okay. The first lady's name was Sarah. The second one is Negasti (phonetic sp.). The third one is Senite (phonetic sp.). The gent's name, the first name, it was Abraham, Eunice, Mulubrahan, Desfalen, Yunata, Zacarias.

Q. Okay. What did they teach you about?

A. About Jesus.

Q. What about Jesus?

A. Jesus was born, because of us. He was crucified, because of us. He died, because of us.

Q. Did you study with them?

A. Yes.

Q. Did you practice the Protestant religion with them?

A. Yes.

Q. In what ways did you practice?

A. They had a deep knowledge about the Bible. They used to mention each and every paragraph of the Bible and each and every sentence of the Bible, and that's how they used to teach me. **[55]**

Q. And why did you practice with them?

A. Well, because I have come to know that the only true way is the way of Jesus, and that's why I started practicing the religion with them. And it's only after these people came, that my mental condition had been renewed, and I got emotional sentiment and happiness. And I had, you know, because of them, I could forget the miserable situation in which I was, and because of these people's teaching, that I became somewhat relaxed and forget every misery that I had been in while I was in prison.

Q. Did you continue to practice this religion after you were released from prison?

A. Yes. We used to practice the religion in hiding.

Q. Where did you practice?

A. In that military camp, there were like civilian homes or rooms, because the military camp is very wide. So we used to take, you know, a room, and then we used to pray or practice the religion inside that room.

Q. Why did it have to be in secret?

A. It, because it was forbidden by state, because that religion, Protestant religion was forbidden to practice, it was forbidden to practice the Protestant religion in Eritrea.

Q. In what ways did you practice?

A. Okay. Well, what do you mean? May I explain it for you in Amharic? Or shall I explain it verbally, or shall I show it to you, practically, how we do when we practice or when [56]

we pray the religion, practice the religion?

Q. However you want to communicate it is fine.

A. Okay. We stand in a row, and then our pastor stands in front of us. And then he holds the Bible, and each and every of us holds the Bible. And then we start singing, and then as a chorus, the chorus sing the song. And after singing, he, the teacher or the pastor, would read each and every paragraph from the Bible, and then tries to elaborate for us what that paragraph means. And he, we follow him while he was reading the Bible, and on our Bible, we follow him. And that's how we practice the religion. That's how we learn about the religion together.

Q. Were you ever caught practicing your religion?

A. Yes. Well, we, even though we were not caught red-handed, but the officials got information about what we were doing. And then the military of-

ficial called me and said that you started practicing this religion. And because of this, you will be penalized. And at this time, I was not afraid, because the religion gave me energy, and then I said, yes, I practice the religion, and I was not afraid at all, and I tried to confront him.

Q. And what happened?

A. Then he arrested me.

Q. And where did he take you?

A. Well, in the same prison. [57]

Q. How long were you in prison?

A. For 20 days.

Q. Yes.

A. No, it was only after I was released that they threatened me.

A. Well, after I was, two months after I was released.

Q. Two months after you were released from the first prison

A. Yes.

Q. And what did you do while in prison for these 20 days?

A. Well, I did not participate in any kind of labor activity, but they kept me inside, because keeping you inside is one form of punishment. If they let you outside, you can get fresh air and sunshine, so they kept me inside. And at this time, I was not afraid, and I was somewhat energetic while waiting inside there.

Q. Why were you energetic?

A. Because I had Jesus Christ in my heart at this time. And a quotation that Jesus said that everyone who believes in me would be punished on this earth, would be arrested, would be tortured, and since I was arrested because of Jesus Christ, I was very happy. And that, Jesus's quotation used to come to my mind and give me energy and happiness.

Q. Were you threatened while in prison?

A. The 20 days? [58]

Q. Yes.

A. No, it was only after I was released that they threatened me.

Q. Who threatened you?

A. My supervisor.

Q. What did he say?

A. If I see you, if you would be caught participating or praying in this religious activities, I, myself, would kill you. That is what he said.

Q. And what did you say to him?

A. I did not say, but, you know, I just laughed at him, and I was happy, and then I went out.

Q. Did you continue to practice your religion after you were released?

A. Yes. Even I increased the degree of participation or practicing the religion, even there where base, in which, you know, I stay awake practicing the religion the whole night with the group, with the group.

Q. Okay. Did you later fully convert to the Protestant religion?

A. Yes.

Q. How did you convert?

A. I was attracted by the reality in that religion. [59]

And I really regretted my old days in which I could not see this light in the religion. And now I have a deep knowledge of the Bible, and right now, even I involve myself in, you know, spreading the religion and teaching others at this moment.

Q. Were you baptized?

A. Yes.

Q. When were you baptized?

A. In year 2002, like 17 people, 17 of us were taken to the sea. And on the sea, we were baptized. The military officials were not aware of this baptism. They were not aware of what we were doing at that time. We were baptized in secret.

Q. Who baptized you?

A. Pastor.

Q. Okay. And what did you do after you were released or let me rephrase. Did you go back to work after you were released from prison?

A. Do you mean to prison?

Q. After 20 days in prison, did you go back to work?

A. Yes. I went back to my duty, to my work. As a matter of fact, since I was considered as a prisoner throughout, I could not go out of the military base, so I started working again inside the military base, not outside.

Q. And what was your job?

A. Well, I was a security guard of the gates. And also, I [60]

used to do the sea or ocean surveillance, and also, I used to work as a prison guard. So I used to accomplish these jobs (indiscernible).

Q. Were there any jobs that you weren't allowed to do?

A. Could you please repeat the question for me?

Q. Were there any jobs that the military would not allow you to do?

A. Yes. I was not allowed to work in the offices, because, since I was an Ethiopian, they didn't want to share with me any kind of military secrets. That's why I was assigned to work as a guard, because working as a guard, you cannot share any kind of military secrets with them.

JUDGE TO MR. NUGUSA

Q. What are you saying? Share what?

A. Share military secrets.

Q. Okay.

MS. ROBINSON TO MR. NUGUSA

Q. Why wouldn't they want to share military secrets with you?

A. The first reason is, I denied or I declined going to the war front. Second, I am an Ethiopian.

Q. Okay. And what were your duties as a patrolman at the military base?

A. Well, one of the duties was like, you know, bringing out the prisoners from their cells and punishing them. **[61]**

You would not allow prisoners to take shower, like you would not allow prisoners to go outside of their rooms, because they might get fresh air, and I objected or I declined taking such an action of punishing the prisoners.

Q. You were instructed to punish the prisoners?

INTERPRETER TO JUDGE

Q. I'm sorry. Your Honor, can I get that repeated?

A. Yes. Just ask him—

JUDGE TO MR. NUGUSA

Q. Please repeat your answer.

A. Yes. I was arrested, I'm sorry, I was ordered to punish the, the prisoners, but I did the opposite way, like the, I did the irony, the irony of what they ordered me.

Q. And why did you disobey the instructions?

A. My religion doesn't allow me. My religion, the religion teach me to be merciful to my brother. My religion teaches me to sacrifice myself on behalf of my brother. So my religion doesn't allow me to punish others. That's why I refused or disobeyed this order, that order.

Q. Who gave you these instruction?

A. Colonel Mukunan.

Q. Did Colonel Mukunan ever punish any prisoners?

A. Yes. Colonel Mukanan used to punish prisoners by exposing them to the strong sun heat and also electrically [62]

torture, electric torture, like electrically, using electricity to torture them and also, by tying the prisoners. Yes, he used to punish them.

Q. Did you ever personally witness anyone being tortured by being put out in the sun?

A. Yes, I saw one.

Q. Do you know why he was out in the sun?

A. When, I really, I don't know. I have no idea why, but last time I reported for my duty and started working for that day, I saw that prisoner being exposed to the sun heat.

Q. Did you talk with him while he was out in the sun?

A. Yes.

Q. And what did he say?

A. He said that really, the prisoner said to me that he was not sure why he was arrested, but the authorities accused me of selling the armaments, and that's why they arrested me, but I did not sell the armaments. That is what the prisoner told me.

Q. Did the prisoner say anything else to you?

A. Then the prisoner asked me to pass for him some drinking water, and then I gave him some drinking water.

Q. Did anyone see you do this?

A. Yes.

Q. And what happened?

INTERPRETER TO JUDGE

Q. Okay. I'm sorry, Your Honor, can I get this repeated, please? **[63]**

A. Yes.

Q. Okay.

MR. NUGUSA TO JUDGE

Q. My close supervisor—

INTERPRETER TO JUDGE

Q. I don't now how to say aslethrica (phonetic sp.) in English, I'm sorry. Like, it's below major. Like, you know, it's not a private a soldier, it's just what is up above the private soldier.

A. Well, a lieutenant is just below major as an officer. You also have a Sargent.

Q. Probably Sargent, or below Sargent, just between the private and the Sargent.

MR. NUGUSA TO JUDGE

Q. So that close supervisor of me saw me, saw what I did and reported to the officials, to the higher authorities.

MS. ROBINSON TO MR. NUGUSA

Q. And then what happened?

A. Then he asked me why I handed water to that prisoner. And then I said, he said, I'm thirsty, I need water, so I gave him water. That's what my answer was.

Q. And then what happened?

A. Then he reprimanded me or gave me warning not to do such thing from now onwards, don't repeat

this action. And then, as I said, okay, when I went back, I found the prisoner [64]

laying dead.

Q. Who reprimanded you?

A. The authority, I mean the official, the prison official, the—

Q. Did he threaten you?

A. He reprimanded me not to do it again.

Q. Were you ever threatened on any other, on any occasions, any other occasions while you were working at the prison?

A. Then I also allowed the ladies to take shower. And then, last time they saw that, they asked me why I did that. I said, you know, they had not been taking shower for a long time, and at the same time, they were exposed to the strong sun heat. So their bodies began producing bad odor, so that's why I allowed them to take shower. And then they said you must be an Ethiopian spy; that's what they said.

Q. Why would they say that?

A. Because I disobey their orders most of the time, that's why.

Q. Did you ever do any other favors for the prisoners?

A. Yes. I did a lot of favor for the prisoners, because I determined to do something good. Because I know from now onward, these people are going to kill me. And let me die, if I die, let me die while doing something good. And then, I [65]

started allowing the prisoners to go outside during the night and during the evenings and get, you

know, refresh themselves in the fresh air. I started handing them, like was food, was water and also even for the gents who smoked cigarette, I used even to give them and provide them with cigarettes, so that they can smoke cigarettes.

Q. Were you ever caught doing any of these things?

A. Well, since I really was determined and said let come whatever would come, and I was not afraid, but, however, fortunately, I was not caught after that.

Q. Were you afraid for your life, while working as a prison guard?

A. Yes.

Q. Who were you afraid of?

A. Well, my closest supervisors or the, my closest supervisors, because if they pass this information about what I am doing to the higher authorities, the authorities might kill me. That's why I was afraid.

Q. What reasons did they have to kill you?

A. First of all, in Eritrea, it's something common to kill people. So particularly if they catch me red-handed, while, you know, disobeying or doing something against their order, yes, they would kill me. That's why. And probably, it could be for that reason that they, in order to watch me properly, they assign me to that position. **[66]**

Q. Were you allowed to leave the camp at any time?

A. No. I was not allowed to go outside the camp, the military camp. Even when I was released from the prison, they gave me an order not to even mix

with people, not to even, you know, talk or share ideas with people. This is the warning that they gave me when they released me from prison.

Q. Where did you sleep at night?

A. I used to stay with my friends during the night.

Q. Why did you stay with your friends at night?

A. Well, I used to sleep or stay with my friends.

Q. Why did you do that?

A. The reason why I used to sleep or stay with my friends during the night, is because if I stay with my other comrades or military members, they can, you know, if they come and take me during the night and kill me, nobody knows the whereabout of me. But the reason why I resorted to staying or sleeping with my friends is that in case they come during the night, take me and kill me, these friends of mine would know where I went and who took me. And they might, you know, have the information, so that's why I wanted to stay with my friends.

Other than that, even there were a lot of people like me, who share double identity, who are Ethiopians and Eritreans on one side. They, we are not free to communicate, we are not free to interact, because they are afraid that one day we might get together and start in a, start, you know, rebellious activity [67]

against the government.

Q. During this time, did you ever try to escape from the base camp?

A. I'm sorry, could you repeat?

Q. Did you ever try to escape from the base camp?

A. I tried, I used to try every time, every day.

Q. Why didn't you ever escape?

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MS. ROBINSON

Q. Please continue.

A. Thank you, Your Honor.

MS. ROBINSON TO MR. NUGUSA

Q. Why didn't you ever escape?

A. Well, at this time, I was, in fact, afraid that if they catch me while I was trying to escape, they would definitely kill me. So I had to wait for the proper time and place, and I had to prepare myself to successfully escape from that place. So I was planning and doing some kind of pre-conditions, preparing some kind of pre-conditions that would allow me to safe, to escape from that area safely.

Q. What would happen if they caught you trying to escape?

A. They would kill me.

Q. How do you know that they would kill you? [68]

A. Well, in Eritrea, if you try to escape, the consequence would be execution, execution. They would kill you. Prior to this, like 400 people, when they came back from Malta, nobody knows the whereabouts of those, of those people. They were taken,

and today, nobody knows what the destiny of those people was.

Q. Do you personally know anyone who was caught trying to escape?

INTERPRETER TO JUDGE

Q. I'm sorry, Your Honor, can I (indiscernible)—

A. Yes. Ask him to repeat.

INTERPRETER TO MS. ROBINSON

Q. What was the question again?

MS. ROBINSON TO MR. NUGUSA

Q. Do you personally know anyone who was caught trying to escape?

A. Well, I did not see any person who was caught while trying to escape, but I know of friends of, my friends, who escaped, but nobody knows about the whereabout of them today.

Q. What were your friends' names?

A. Mahatema (phonetic sp.) and Ghirmay (phonetic sp.).

Q. And when did they try to escape?

A. Well, really, I don't exactly remember the time, but it was like around 2000 or 2001. **[69]**

Q. And what happened to them?

A. On who?

Q. What happened to your friends?

A. Yes. My friends used to write letters to their families, but after a while those letters dried out. They did not used to send any letters to their fami-

lies. So that means these friends of mine had been executed.

Q. How long were you at the base camp working as a guard?

A. Well, since I had to participate in a different activities or different types of jobs in the camp, there was no particular time that had been fully assigned for the security guard.

Q. How many years did you work at the base camp?

A. Four, four years. Four years.

Q. And when did you leave?

A. Do you mean the day that I left, in which I left from the military camp?

Q. Yes.

A. On 10-23-2004.

Q. And how did you escape the base camp?

A. From the very beginning, I had my own plan.

Q. What did you do?

A. Well, I clearly have come to know some facts. The facts were, if I stay in the base camp, one day, they are going [70]

to take me to the war front. And in the war front, I would inevitably kill people, human beings. And if I refuse, I would also be killed. So I chose something that is to be killed while trying to escape. That was my decision.

Q. Can you describe what you did the night that you escaped?

A. Okay. Then, you know, that night after going to the sea, and then by kneeling down in front of God, for two hours, I cried and prayed, God, and then, and prayed to God, so that he can save me. And then I, using the place, the weak spot on the prison camp, I escaped through that spot and walked into the jungle, and then went into my friends.

Q. How far was it to your friend's house?

A. Like two or three kilometers, approximately.

Q. How did you get there?

A. By walking in the jungle.

Q. How long did it take you to get there?

A. Well, if you walk on the proper road, it takes like half an hour, walking. But since I was walking in the jungle, it took me like two hours. [71]

Q. Were you afraid of being caught?

A. Well, let me go back to the time that I spent in walking the jungle. It was like for three hours. Okay. This is the interpreters mistake. I did not say two hours, but it was three hours.

Q. Thank you. And were you afraid of being caught?

A. Yes.

Q. So why did you take the risk and escape at that specific time?

A. Well, because if I stayed there, it was inevitable that they would kill me, and I knew that. So I said, it's better to die while trying to escape, because here, in escaping, I have two chances, either to successfully escape or getting caught and killed. However, if I stayed in the military camp, there was a

hundred percent chance of getting killed. That is why I took the risk of escaping.

Q. And why did you decide to leave that night?

A. Well, God decided, or God allowed me to do that.

Q. And what happened once you arrived at your friend's house?

A. Then I went to my friend's home, and I related my situation to my friend. And then, he said, no problem, you can stay with me. And since he had, you know, work to do, he left me at his home and went.

Q. And then what happened?

A. Then (indiscernible) time I went out to urinate during the night, Museh (phonetic sp.) saw me and called me.

Q. Who is Museh?

A. Museh is the person who came with me.

Q. How do you know Museh? [72]

A. I know him in that military camp.

Q. And—

JUDGE TO INTERPRETER

Q. He knew what?

A. I know, okay, may I ask him to repeat the –

Q. Yes.

MR. NUGUSA TO JUDGE

Q. Well, I used to know Museh in the military camp, but we didn't have acquaintance. We used to

say, you know, hi, hi, whenever we see each other. We just know each other, just by facially.

MS. ROBINSON TO MR. NUGUSA

Q. Okay. And what happened after you saw Museh that night?

A. Well, at the beginning when I saw him, I was scared, and I was afraid, saying that he is a military, and he might do something to me. And then, as I approached him, he said what do you think about the military camp? You know, I said, it's okay. You know, I escaped from the military camp. He said, last time, he said I escaped from the military camp, I somewhat stabilized myself. Before that, I was disturbed, emotionally, when I saw him. I was scared.

Q. Then what happened?

A. Then he forwarded some idea for me of trying to go to Sudan. And then I said, it's impossible to go to Sudan, **[73]**

because the checkpoints are there, and we cannot cross the checkpoints. And also, we thought about going to Yemen, crossing the sea to Yemen. And we said that, no, we cannot go to Yemen, because we don't have money to cross the sea. And then I brought one idea. And I told him that originally when I escaped from the camp, I had the tankers in my mind, that I would go into the container. And then I told him, if we get an open container, we would go and hide inside the container. That's what I told him.

Q. And what did you decide to do?

A. To check the container and then go inside the container and hide.

Q. Where was the container?

A. The container floats on the sea.

Q. Then what happened?

A. Then I left the, my friend's home, and then we, I went with Museh, to Museh's relative's home. And then the next morning, we swum the sea and checked the container.

Q. And then what happened?

A. Then, when we reached the container, we could not open the container with the strings that we had, because the string, the container can only be open with the crane. And then, here was, there were like two ventilations, and when we looked at the ventilation, it was not open. And then we said, what if we cut this part? Then, when we checked from the other side, we got the ventilation open. And then we went into the ventilation. [74]

Q. What happened next?

INTERPRETER TO JUDGE

Q. Okay. Your Honor, I think I must have done some mistake. May I go back and ask him the first response, the first answer.

A. I think we are lost here. I know I am.

JUDGE TO MS. ROBINSON

Q. Do you remember your question that got this started?

INTERPRETER TO MS. ROBINSON

Q. Yes. Just the question before this one.

A. The question before this one. I think I just said what happened next, but I believe he was talking about, he swam out to the sea, to the container.

JUDGE TO MS. ROBINSON

Q. Well, he said that he couldn't it, because he needed a crane.

A. Right.

Q. So he inspected the ventilation system.

INTERPRETER TO JUDGE

Q. Okay.

MS. ROBINSON TO JUDGE

Q. Right.

JUDGE TO MS. ROBINSON

Q. Asked about cutting something, and then they cut [75]

it open, and they went through the ventilation. That was the last thing respondent said.

INTERPRETER TO JUDGE

Q. Yes. In that part, waiting in the ventilation, but later on, he said that, they went back and bought some razor blade, and then they could successfully open the ventilation. That's what he said later on.

JUDGE TO MS. ROBINSON

Q. Just ask him how they opened, how they were able to open it (indiscernible).

INTERPRETER TO JUDGE

Q. Good. Thank you. Thank you.

MS. ROBINSON TO MR. NUGUSA

Q. How were you able to get inside the container?

A. We cut it.

Q. Okay. How long did it take you to cut it open?

A. Five days.

Q. How did you cut it open?

A. The ventilation has like a square shape or a like three angle shape. And then, no, no, rectangular shape, I'm sorry, and then we cut it from this side, I cut from this side, and he cut from that side, and we cut it and removed it.

Q. Okay. When did you cut away at it?

A. Do you mean the dates?

Q. What time of day? [76]

A. We go to cut the ventilation during the night, not during the day.

Q. Okay. And then what happened after you cut it open?

A. Then after we opened it, we brought food, we brought water and put inside.

Q. Did you get inside the container?

A. Immediately after we opened the container, I went inside and checked. When I checked it, it was very hot, and I said to him, it's very hot. He said, no problem, because if they get us here, they might kill us, they would kill us, so let's our try our chance. Either we would die here inside the container, or we would successfully, you know, go somewhere, so let's try. And then, by deciding that, we went back, both our food and water, brought our food and water and stored it in the container.

Q. How long were you inside the container?

A. 15 days prior to the arrival of the ship.

Q. What happened when the ship arrived?

A. The ship loaded us and went and departed.

Q. Do you know where the ship came from?

A. I don't know.

Q. Did you know where the ship was going?

A. I don't know. [77]

Q. Did you know how long you were going to be at sea?

A. I don't know.

Q. How did you plan to survive the journey?

A. It was a very difficult and dangerous journey. It was very hot, and also, we used to breath extremely polluted air. And it was very dark. We were suffocated, in fact, to the, where is to the extent of suffocation. And sometimes we call each other and, hey, are you alive? Are you alive? We said, because we could not see each other. It was very dark inside.

Q. Were you afraid that you might not survive the journey?

A. Yes. You know, it was something unthinkable and unimaginable. Yes, it was very dangerous.

Q. So why did you take the risk and get on the ship?

A. Well, I decided this, because it's better than being killed with the bullets of the, the government officials, you know. It's better to escape in this way, because you can either, you know, escape or you can get died. So this method would be better, or this way

would be better than getting killed, you know, by their bullet.

Q. How long were you at sea?

A. You mean on the journey?

Q. Yes.

A. For 30 days.

Q. Excuse me.

MS. ROBINSON TO JUDGE

Q. May I? [78]

A. All right.

JUDGE FOR THE RECORD

The Court needs a comfort break.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record after a short break.

JUDGE TO MS. ROBINSON

Q. You may continue, Counsel.

A. Thank you, Your Honor.

Q. He had just said he'd been at sea for 30 days.

A. Okay.

MS. ROBINSON TO MR. NUGUSA

Q. And how did you know how many days had passed?

A. Museh had a Casio wrist watch on his hand, and he used to count the days, using that watch.

Q. How did you survive the journey?

A. Could you repeat the question?

Q. How were you able to survive the journey?

INTERPRETER TO JUDGE

Q. Okay. I'm sorry, Your Honor, can I get repeated, the last (indiscernible)—

A. Can you do what?

Q. Can I get repeated, the last statement, please? **[79]**

A. Just ask him to repeat it.

MR. NUGUSA TO JUDGE

Q. Well, we stored our own food. Originally, prior to our departure, you know, we used that food and water for 10 days. And then, we sneaked out of, to the ship in order to steal food from the ship.

MS. ROBINSON TO MR. NUGUSA

Q. And then what happened?

A. Then after we went on the ship to steal the food, we got someone who was hiding on the ship.

Q. And then what happened?

A. Then we took him from that hiding spot and brought him to our place, saying that, we're suspecting that if they got him, he might inform them about us. So we brought him to our place.

Q. And—

MR. MCKLUSKEY TO JUDGE

Q. Your Honor, I'm sorry to interrupt. Could we go off the record for a second?

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Back on the record.

JUDGE TO MS. ROBINSON

Q. Go ahead. [80]

MS. ROBINSON TO MR. NUGUSA

Q. Daniel, are you afraid to return to Eritrea?

A. Yes.

Q. Why are you afraid?

A. Because they would kill me.

Q. Why would they kill you?

A. Yes. One, I escaped from the military camp, and when I go back and look at my past history, or past condition, I know for sure they would kill me.

Q. Are you able to return to Ethiopia?

A. The same thing.

Q. What would happen to you if you went to Ethiopia?

A. Well, I know that the Ethiopian case would be the worst case, because they know that I had been working for the Eritrean military. And if I go back to Ethiopia, they would consider me as a spy, who works for the Eritrean military. And even, they would not even directly kill me, but they would harass me, torture me and then finally kill me. Even they would not kill me immediately.

Q. Of what country are you a citizen?

A. Eritrean.

Q. When did you become an Eritrean citizen?

A. After 1995.

Q. How did you become an Eritrean citizen?

A. Because I had complete my duty as a, when I was [81]

drafted into the military, I was willing to participate in the military, and I have finished my military obligation, national, military obligation services. That's why I got the citizenship.

Q. So you're no longer a citizen of Ethiopia?

A. They would not give me.

Q. Is there anything else that you'd like to tell the Court today?

A. No, there is nothing.

Q. Thank you.

A. Thank you, too.

JUDGE TO MR. MCKLUSKEY

Q. Cross?

A. Thank you, Your Honor.

MR. MCKLUSKEY TO MR. NUGUSA

Q. Mr. Nugusa, what religion were you before you converted to Protestantism?

A. Orthodox.

Q. Orthodox?

INTERPRETER TO MR. MCKLUSKEY

Q. Sorry?

MR. MCKLUSKEY TO MR. NUGUSA

Q. Did you go to church, to an Orthodox Church? Did you actually attend an Orthodox church, or were you just born orthodox?

A. I used to go and pray in the church. [82]

* * * * *

Q. At night, did the guards go back to the military base, or did they guard, or did they surround the prison?

A. They have their own dormitories, just next to the prison, and so they stayed there.

Q. So was the prison guarded at night?

A. Yes.

Q. Okay. Did you ever see anyone attempt to escape from the prison?

A. Do you mean from our prison?

Q. Yes.

A. No one.

Q. Okay. And then when you got out of prison, in, I think you said it was 2001; is that correct?

A. Yes.

Q. Okay. And earlier you said that they'd alternate you between three jobs, a security guard at the gates, a security guard at the sea and the ocean and prison guard; is that correct?

A. Yes.

Q. Okay. When you were a security guard at the gates, what did that entail?

A. Just controlling the, the incoming and outgoing vehicles, controlling and checking.

Q. And what were you checking for?

A. When the authorities vehicle come, they, you open the gate for them. **[101]**

Q. Okay. And what about ones leaving?

A. Yes. My duty was just to opening and closing the gate.

Q. Okay. Did you do this during the day or—

JUDGE TO MR. MCKLUSKEY

Q. Hold on for a second. (Indiscernible.) All right. Go ahead.

A. Okay.

MR. MCKLUSKEY TO MR. NUGUSA

Q. Did you do this during the day, or did you do it at night?

INTERPRETER TO MR. MCKLUSKEY

Q. I'm sorry?

MR. MCKLUSKEY TO MR. NUGUSA

Q. Did you do this during the day, or did you do it during the night.

A. Well, according to the shift that you are allocated to, assigned to. It depends.

Q. And was this, was this at a gate inside the military camp?

A. Yes.

Q. All right. So if you got of this gate, you would be, you'd still be in the camp?

A. Do you mean the vehicles?

Q. I mean if someone was crossing through this gate, [102]

when they were leaving, when they got out of the gate, would they be still in the military base or would they be outside the military base?

A. Well, in that area, it's forbidden for pedestrian to walk in that area. It's only the authorities vehicle would approach that area, would come to that area.

Q. Okay. And were you carrying a gun at this time, when you were doing the security guard at that gate, would you be carrying a gun?

A. Yes.

Q. All right. And what kind of uniform would you be wearing?

A. Well, there is a uniform that I had on when I came here to this country.

Q. Okay.

MR. MCKLUSKEY TO JUDGE

Q. Your Honor, I believe it is Tab Q.

A. Picture in uniform are at Tab Q.

Q. Yes, Your Honor. May I approach the witness?

A. Yes.

MR. MCKLUSKEY TO MR. NUGUSA

Q. Sir, is this the uniform you would wear?

A. Yes.

Q. You also you were, your job was to be a security guard for the sea and the ocean. What did that job entail? **[103]**

A. Well, as I said previously, we controlled the sea, like we controlled the smuggler boats, the boats that smuggle contraband.

Q. Okay. Was that in the prison, or was that in the military base?

A. Well, the Eritrean military situation is not wall organized. It is a kind of disorganized and, you know, you can be located to anywhere in the military services, you know. Say, for example, if you are in the navy, you can, you know, you can be assigned to any kind of activity, duty.

Q. Now, were you on land when you were, when you were being a guard, you said for the sea or the ocean. Were you on a boat, or were you on land?

A. If you are assigned to do the surveillance on the sea, it would be on the sea. If you are assigned to do the surveillance on the land, it would be on the land.

Q. Good. Thank you. And were you assigned to do both of those, or did you do one, only one of those?

A. Well, we work on rotation basis, like one week, you work here, and one week, you work there. We have like groups, and this group, for this week, would do surveillance on the sea. And this group again, the other week works in the, on land, in the military camp, and like we rotate in the prison, the military camp, the sea. That is what we do, what we did.

Q. Okay. When you were a prison guard, what did your [104]

job entail?

A. Do you mean the duties to which we are assigned?

Q. Yes.

A. Well, our duties were to firmly control the prisoners, to punish the prisoners, too, by exposing them to the extreme sun heat. Certainly, also to for-

bid the prisoners from not getting the opportunity to take shower.

Q. Was your job to keep them from escaping?

A. Yes.

Q. Okay. When you worked on the prison guard, was your job also to move people around? For example, if the needed to be one place, did you move them from, say, one person's office to another person's office?

A. No, we don't do that.

Q. When they were getting out of their cell, were you in charge of making sure they went where they were supposed to go?

INTERPRETER TO MR. MCKLUSKEY

Q. When they left their cell, would a prison guard be in charge of making sure they were where they were supposed to?

A. Our duty was just to secure or to, you know, control the prison, to keep the security of the prison. But it's the authorities who would come and lock the gates and the doors and remove the prisoners from their cells, not us.

Q. All right. And when you were a prison guard, did [104]

you have a gun?

A. Yes. I was given the gun as soon as I joined the Heili Bariera.

Q. All right. And how long did you work at the prison?

A. Well, since we, we were assigned on rotation basis, really, it's very difficult for me to put aside say-

ing that I worked for this amount of definite period of time. It's very difficult for me to calculate that way.

Q. Earlier, you told a story of seeing a guy die because of sun exposure, how was it that you were, ended up talking to this man?

INTERPRETER TO MR. MCKLUSKEY

Q. I'm sorry, how were—

MR. MCKLUSKEY TO MR. NUGUSA

Q. How did you end up talking to this man?

A. When you say how did you end up talking to this person, what do you mean? Could you please -

Q. Was there a reason you were out, were you guarding him or were you, how did you end up getting close enough with him to speak with him?

A. Yes. I was guarding him.

Q. Okay. So you were guarding him the time when he was out in the sun?

A. Yes. Since he was there at the place— **[106]**

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MR. MCKLUSKEY

Q. All right. Continue.

A. Okay.

MR. MCKLUSKEY TO INTERPRETER

Q. I'm sorry, you, the question was you were guarding him when he was out in the sun. And I think you were in the middle of—

MR. NUGUSA TO MR. MCKLUSKEY

Q. Yes. He was already kept in the sun or exposed to the sun. And by the time, I reported to my duty, I found him being exposed to the sun at that place, and I found him on this spots.

MR. MCKLUSKEY TO MR. NUGUSA

Q. Okay. When you first came to the United States or soon thereafter, do you recall being interviewed by an asylum officer?

A. Yes, I remember.

Q. Okay. In that, they asked you a question, did you have personal interaction with people that died because of sun exposure. [107]

Do you recall answering yes?

A. Could you please repeat the question?

Q. In it, you were asked that, did you personal interaction with the people that died because of sun exposure. Do you recall answering yes?

A. I was asked this type of question.

Q. Do you recall being asked, were you guarding them to make sure they stayed in the sun and answering yes?

A. Well, when the asylum officer asked me, he asked me if I guarded the prisoners, and for that, I said, yes, I guarded prisoners. And also, and also, I told him that, yes, I saw prisoners who were caught while trying to escape to Yemen. That is what I said.

Q. You also earlier said that you had, I think, I believe you said you saw people who were tortured using electricity; is that correct?

A. Well, it's the authorities who torture, who use electric torture to torture the prisoners, but I did not

see that. But I heard from prisoners, saying that we were tortured electrically, and that is when I learned that the authorities used electricity to torture prisoners.

Q. So you never saw that when you were guarding the prison or when you were a prisoner in the prison?

A. Well, absolutely, I did not see prisoners while, I did not see when they tortured prisoners. They torture prisoners in secret. I did not see them being tortured.

Q. I've got no further questions.

JUDGE TO MR. NUGUSA [108]

EXHIBIT 1 (EXCERPTS)

U.S. Citizenship and Immigration Services

Record of Determination/Credible Fear Worksheet

NOL	ZHN	15 573 924	NEQUSIE
District Office Code	Asylum Office Code	Alien's File Number	Alien's Last/ Family Name
Berger	Jack	Eritrea	
Asylum Officer's Last Name	Asylum Officer's First Name	Alien's Nationality	

All statements in italics must be read to the applicant

SECTION I: INTERVIEW PREPARATION

I.1 12-20-04
Date of arrival (MM/DD/YY)

I.2 New Orleans, LA
Port of arrival

I.3 12-20-04
Date of detention (MM/DD/YY)

I.4 Orleans Parish Prison, 2800 Gravier St New Orleans, LA 70119
Place of detention

I.5 12-20-04
Date of AO orientation (MM/DD/YY)

I.6 _____
If interview more than one week from date of detention, explain delay

I.7 01-27-05
Date of interview (MM/DD/YY)

I.8 _____
Interview site

I.9 ☒ Applicant received and signed Form M-444 and relevant *pro bono* list on 12-20-04
(Date signed (MM/DD/YY))

I.10 Does applicant have consultant(s)? ☐ Yes ☒ No

I.11 If yes, consultant(s) name, address, telephone number and relationship to applicant

I.12 Persons present at the interview (check which apply)

I.13 ☐ Consultant(s)

I.14 ☐ Other(s), list: _____

I.15 ☒ No one other than applicant and asylum officer

I.16 Language used by applicant in interview

I.17 LSA # L06203	☒ Yes ☐ No	9:22	10:20
Interpreter Service, Interpreter ID Number.	Interpreter Has Form	Time Started	Time Ended
I.18 _____	☐ Yes ☐ No	_____	_____
Interpreter Service, Interpreter ID Number.	Interpreter Has Form	Time Started	Time Ended
I.19 _____	☐ Yes ☐ No	_____	_____
Interpreter Service, Interpreter ID Number	Interpreter Has Form	Time Started	Time Ended

I.20 ☒ Interpreter was not changed during the interview

I.21 ☐ Interpreter was changed during the interview for the following reason(s):

I.22 ☐ Applicant requested a female interpreter replace a male interpreter, or vice versa

I.23 ☐ Applicant found interpreter was not competent

I.24 ☐ Applicant found interpreter was not neutral

I.25 ☐ Officer found interpreter was not competent

I.26 ☐ Officer found interpreter was not neutral

I.27 ☐ Bad telephone connection

I.28 ☒ Asylum officer read the following paragraph to the applicant at the beginning of the interview.

The purpose of this interview is to determine whether you may be eligible for asylum or protection from removal to a country where you fear persecution or torture. I am going to ask you questions about why you fear returning to your country or any other country you may be removed to. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. U.S. law has strict rules to prevent the disclosure of what you tell me today about the reasons why you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your claim and in any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you tell me something I do not understand, I will ask you to explain.

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SECTION II: **BIOGRAPHIC INFORMATION** A 15 575 924

2.1 NEGUSIE
Last Name/ Family Name (ALL CAPS)

2.2 Daniel Girmai — 2.3 —
First Name — Middle Name

2.4 1/15/1976 — 2.5 Gender: male
Date of birth (MM/DD/YY)

2.6 —
Other names and dates of birth used

2.7 Ethiopia — 2.8 Eritrea
Country of birth — Country (countries) of citizenship (list all)

2.9 Eritrea
Address prior to coming to the U.S. (List Address, City/Town, Province, State, Department and Country)

2.10 Tigrinia — 2.11 Catholic Christ Other, None — 2.12 Arabafic
Applicant's race or ethnicity — Applicant's religion — All languages spoken by applicant

2.13 Marital status: ☒ Single ☐ Married ☐ Legally separated ☐ Divorced ☐ Widowed

2.14 Did spouse arrive with applicant? ☐ Yes ☐ No

2.15 Is spouse included in applicant's claim? ☐ Yes ☐ No

2.16 If currently married (including common law marriage) list spouse's name, citizenship, and present location (If with applicant, provide A-Number):

2.17 Children: ☐ Yes ☒ No

2.18 List any children (*Use the continuation section to list any additional children*):

Date of birth (MM/DD/YY)	Name	Citizenship	Present location (If w/PA, list A-Number)	Did child arrive with PA?		Is child included in PA's claim?	
				☐ Yes	☐ No	☐ Yes	☐ No
				☐ Yes	☐ No	☐ Yes	☐ No
				☐ Yes	☐ No	☐ Yes	☐ No
				☐ Yes	☐ No	☐ Yes	☐ No
				☐ Yes	☐ No	☐ Yes	☐ No
				☐ Yes	☐ No	☐ Yes	☐ No

[redacted] 15 573 924

2.19 Does applicant claim to have a me [redacted] condition (physical or mental), or has the officer obs. any indication(s) that a medical condition exists? If YES, answer questions 2.20 and 2.21 and explain below ☐ Yes ☒ No

2.20 Has applicant notified the facility of medical condition? ☐ Yes ☐ No

2.21 Does applicant claim that the medical condition relates to torture? ☐ Yes ☐ No

2.22 Does the applicant have a relative, sponsor or other community ties, including spouse or child already listed above? Yes ☒ No

2.23 If YES, provide information on relative or sponsor (use continuation section, if necessary):

Name

Relationship

Address

Telephone Number

☐ Citizen ☐ Legal Permanent Resident ☐ Other

SECTION III: CREDIBLE FEAR INTERVIEW

THE FOLLOWING NOTES ARE NOT A VERBATIM TRANSCRIPT OF THIS INTERVIEW. THESE NOTES ARE RECORDED TO ASSIST THE INDIVIDUAL OFFICER IN MAKING A CREDIBLE FEAR DETERMINATION AND THE SUPERVISORY ASYLUM OFFICER IN REVIEWING THE DETERMINATION. THERE MAY BE AREAS OF THE INDIVIDUAL'S CLAIM THAT WERE NOT EXPLORED OR DOCUMENTED FOR PURPOSES OF THIS THRESHOLD SCREENING.

The asylum officer must elicit sufficient information related to both credible fear of persecution and credible fear of torture to determine whether the applicant meets the threshold screening. Even if the asylum officer determines in the course of the interview that the applicant has a credible fear of persecution, the asylum officer must still elicit any additional information relevant to a fear of torture. Asylum officers are to ask the following questions and may use the continuation sheet if additional space is required. If the applicant replies YES to any question, the asylum officer must ask follow-up questions to elicit sufficient details about the claim in order to make a credible fear determination.

3.1 a. *Have you or any member of your family ever been mistreated or threatened by anyone in any country to which you may be returned?*

☐ Yes ☒ No

b. *Do you have any reason to fear harm from anyone in any country to which you may be returned?*

☒ Yes ☐ No

I'm Afraid I will be executed if I Return

c. If YES to questions a and/or b, was it or is it because of any of the following reasons? (Check each of the following boxes that apply).

☐ Race ☒ Religion ☐ Nationality ☐ Membership in a particular social group ☒ Political Opinion

3.2 ☒ At the conclusion of the inter[redacted]sylum officer must read the following to applic[redacted]

If the Department of Homeland S[redacted] determines you have a credible fear of persecution o[redacted]ture, your case will be referred to an immigration court, where you will be allowed to seek asylum or withholding of removal based on fear of persecution or withholding of removal under the Convention Against Torture. The Field Office Director in charge of this detention facility will also consider whether you may be released from detention while you are preparing for your hearing. *If the asylum officer determines that you do not have a credible fear of persecution or torture, you may ask an immigration judge to review the decision. If you are found not to have a credible fear of persecution or torture and you do not request review, you may be removed from the United States as soon as travel arrangements can be made. Do you have any questions?*

3.3 ☒ At the conclusion of the interview, the asylum officer must read a summary of the claim, consisting of the responses to Questions 3.1 a-e and information recorded in the Additional Information/Continuation section, to applicant.

Typed Questions and Answer (Q&A) narrative notes and a summary and analysis of the claim must be inserted in this form for all positive credible fear decisions. These Q&A notes must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues and that the applicant was given every opportunity to establish a credible fear.

SECTION IV: CREDIBLE FEAR FINDINGS

A. Credible Fear Determination:

Credibility

4.1 ☒ There is a significant possibility that the assertions underlying the applicant's claim could be found credible in a full asylum or withholding of removal hearing.

4.2 ☐ Applicant found not credible because (check boxes 4.3-4.5, which apply):

4.3 ☐ Testimony was internally inconsistent on material issues.

4.4 ☐ Testimony lacked sufficient detail on material issues.

4.5 ☐ Testimony was not consistent with country conditions on material issues.

Nexus

4.6 ☐ Race 4.7 ☒ Religion 4.8 ☐ Nationality 4.9 ☐ Membership in a Particular Social Group

(Define the social group) _____

4.10 ☒ Political Opinion 4.11 ☐ Coercive Family Planning [CFP] 4.12 ☐ No Nexus

Credible Fear Finding

4.13 ☒ Credible fear of persecution established.

OR

4.14 ☐ Credible fear of torture established.

OR

4.15 ☐ Credible fear of persecution NOT established and there is not a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention against Torture.

B. Possible Bars:

4.16 ☒ Applicant could be subject to a bar(s) to asylum or withholding of removal (check the box(es) that applies and explain on the continuation sheet):

4.17 ☐ Particularly Serious Crime 4.18 ☐ Security Risk 4.19 ☐ Aggravated Felon

4.20 ☒ Persecutor 4.21 ☐ Terrorist 4.22 ☐ Firmly Resettled

4.23 ☐ Serious Non-Political Crime Outside the United States

4.24 Applicant does not appear to be subject to a bar(s) to asylum or withholding of removal.

C. Identity:

4.25 ☒ Applicant's identity was determined with a reasonable degree of certainty (check the box(es) that applies)

4.26 ☒ Applicant's own credible statements. (If testimony is credible overall, this will suffice to establish the applicant's identity with a reasonable degree of certainty).

4.27 ☐ Passport which appears to be authentic.

4.28 ☐ Other evidence presented by applicant or in applicant's file (List) _____

4.29 ☐ Applicant's identity was not determined with a reasonable degree of certainty. (Explain on the continuation sheet.)

I-870 (Rev. 11/21/03)

SECTION V: ASYLUM OFFICER / SUPERVISOR NAMES AND SIGNATURES

5.1	Jack Reuter ZHN032 Asylum officer name and ID CODE (print)	5.2	[signature] Asylum officer's signature	5.3	01-27-05 Decision date
5.4	Richard Rhodes / Lee Telfer Supervisory asylum officer name	5.5	[signature] Supervisor's signature	5.6	01-27-05 Date supervisor approved decision

ADDITIONAL INFORMATION/CONTINUATION

A# 15[illegible]924 NEGUSIE, Daniel Girmai

- SEE ATTACHED NOTES -

Form I-870 (Rev. 11/21/03)

Summary

Applicant credibly testified that he is a 29 year-old Protestant male from Eritrea. Applicant is of the Tigrinya tribal group. Applicant testified that he was conscripted into the Navy against his will in 1995 and has not been allowed out. The applicant testified that about two years ago he converted from Orthodox Christian to the Protestant Christian faith. Applicant testified that he is opposed to the current Eritrean government and his protestant religious beliefs demand that he reject military service. The applicant stated that as such he deserted the Navy and left Eritrea. The applicant testified that he now fears that if he were to return he would be branded a deserter and a traitor and executed.

ANALYSIS

There is a significant possibility, taking into account the credibility of the statements made by the alien in support of his claim and sufficient facts known to the officer, that the alien could establish eligibility for asylum under section 208 of the Act or eligibility for protection under the convention against torture. Here, applicant expressed a fear of being branded a traitor and executed because he deserted the Navy after his religious affiliation changed and his beliefs demanded that he discontinue his service. Country reports support the applicant's claim and fear of future harm. The [2003 US Department of State Reports on Human Rights Practices: Eritrea (February 25 2004)] states that "The Government's human rights record remained poor, and it continued to commit serious abuses. Citizens did not have the ability to change their government. Security forces were responsible for disappearances. There were some reports that police resorted to torture and physical beatings of prisoners, particularly during

interrogations, and police severely mistreated army deserters and draft evaders." And "During the year, there were reports that several hundred followers of various non-sanctioned churches (mostly Protestant) were detained or harassed." Thus, applicant has established a credible fear of Eritrea.

CREDIBLE FEAR NOTES

Applicants Name: NEGUISE, Daniel Garmai

A# 15 575 924

Citizenship: Eritrea

Date of Interview: 01-27-05

Q: Have you or any member of your family ever been mistreated or harmed in your country?

A: No. But because I left I will be harmed in the future.

Q: What do you think would happen to you?

A: I will be killed. Before I left about 400 people tried to leave to Sudan and Libya and now no one knows where they are.

Q: Why do you think you would be killed?

A: Because I am a soldier and I ran away from the military.

Q: Why did you leave the military?

A: First because of my religion (Protestant) and second because of personal problems.

Q: What in the protestant religion say you cannot serve in the military?

A. The religion I believe in prohibits being in the military.

Q: Why is it prohibited?

A. I have been arrested before because of my religion. The religion doesn't allow us to serve any government.

Q: Did you volunteer for the military or were you conscripted?

A. I was conscripted.

Q: When were you conscripted?

A: In 1995.

Q: How long have you been a protestant?

A: about two years. I was orthodox before and I changed my religion.

Q: So what your telling me is that when you joined the military you were ok with it and after serving for 8 years you changed your religion to one which no longer allows you to be in the military?

A: Yes.

Q: Why did you do that?

A: Because I believe the religion is correct. That's why.

Applicants Initial

Q: Is military service in Eritrea mandatory?

A: Yes

Q: For how long?

A: They say it is 1 year and a half but once you are conscripted there is no way out.

Q: Have you tried to get out of the military?

A: Yes, but they wouldn't let me out.

Q: Is it common for the Eritrean military to execute its deserters?

A: Yes. Everyone knows that it is common.

Q: Do you personally know of anyone who has been executed for desertion?

A: There are a lot of them. It is common.

MILITARY SERVICE

Q: What was your rank in the military?

A: Private (Navy)

Q: What was you job?

A: We were on a patrol boat there to watch the sea. I was never involved in combat.

Q: Did you ever execute, injure, harm or torture anyone?

A: No. I never did that.

Q: Did you ever guard prisoners?

A: Yes. People who wanted to flee. We were the ones watching them.

Q: Were any of these people that you caught trying to leave executed?

A: No, but they would punish them by putting them in the sun and they would die because of that.

Q: Did you have personal interaction with the people that died because of sun exposure?

A: Yes.

Q: Were you guarding them to make sure that they stayed out in the sun?

A: Yes.

Q: How long were these people made to stand out in the sun?

A: The sun in very very hot and if you stay for two hours there you cannot stand it. The person I know who died is because he stayed there over two hours.

Q: How many people did you force to stay out in the sun?

A: I didn't force them.

DB

Applicants Initials

Q: Weren't you guarding them to make sure they stayed there?

A: It was not in my power. It was the higher authorities that ordered them to stay there.

Q: So are you afraid of the very same people that you used to work for?

A: The superiors in the military, yes.

Q: What was name of your military unit?

A: Haile Bahri

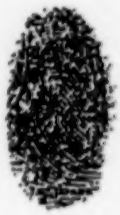
Q: What city or port were you based out of?

A: I worked at Masawa and Asaba.

Applicants Signature

1-27-05

Jack S. Bonner Asylum Officer



PETITIONER'S BRIEF

FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Immigration and Naturalization Act confers upon the Attorney General and the Secretary of Homeland Security broad discretion to grant asylum to a "refugee" as defined in the Act, but prohibits the exercise of that discretion in favor of any person who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1158(b)(1)(A) & (2)(A), 1101(a)(42)(A).

The Act also provides that when "the Attorney General decides that [an] alien's life or freedom would be threatened in [a particular] country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," the Attorney General may deport the alien to that country only in specified circumstances; this benefit also does not extend to aliens who participate in persecution. 8 U.S.C. § 1231(b)(3)(A) & (B). The question presented is:

Whether these "persecutor bars" apply to an alien whose involvement in persecutory acts is involuntary because he engaged in the conduct due to credible threats of death or serious bodily harm.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. 1a-3a) is reprinted in 231 Fed. App'x 325. The opinions of the Board of Immigration Appeals (Pet. App. 4a-8a) and of the Immigration Judge (Pet. App. 9a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007, and a timely petition for rehearing was denied on July 17, 2007. The petition for a writ of certiorari was filed on October 15, 2007, and granted on March 17, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, provides in pertinent part:

   (a) (42) * * * The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208(b) of the INA, 8 U.S.C. § 1158(b), provides in pertinent part:

   (1) (A) The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum * * * if the Secretary of Homeland Security or the Attorney General determines that

such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) (A) In General—Paragraph (1) shall not apply to an alien if the Attorney General determines that—(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

3. Section 241 of the INA, 8 U.S.C. § 1231(b)(3), provides in pertinent part:

(A) In General—* * * [T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception—Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

Granting asylum is a longstanding legal tradition—rooted in the customs of Ancient Egypt, Ancient Greece, and Medieval Europe—under which refugees, persecuted for their political opinions or religious beliefs in their native countries, obtain the protection of a foreign sovereign. The question in this case is whether an individual is eligible for asylum even if the persecution to which he was subjected included coerced participation in his oppressors' persecutory acts.

Federal law confers upon the Attorney General broad discretion to grant asylum, but he may not exercise that discretion in favor of any person who "ordered, incited, assisted, or otherwise participated in persecution." 8 U.S.C. § 1101(a)(42). A similar exclusion applies to the limits on the government's ability to deport victims of persecution who do not receive asylum. *Id.* § 1231(b)(3)(B). The court below held—and the government argues—that these exclusions are applicable even when an individual engaged in the persecutory conduct only because he was forced to do so by credible threats of death or serious bodily harm.

This overbroad interpretation of these "persecutor bars" finds no support in the statutory language or context. It also is contrary to the basic background legal principle—against which Congress legislated—holding that serious adverse consequences should not be based on involuntary actions. Congress did not in any way indicate its intent to override that principle. To the contrary, it is settled that the threat of being forced to engage in persecution of others itself constitutes "persecution" providing eligibility for asylum. The government's position in this case is

that the acts that make a person eligible for asylum as a victim of persecution nevertheless render him or her ineligible for asylum as a participant in persecution.

The consequences of the government's erroneous interpretation of the persecutor bar are substantial. Forced participation in persecutory acts is an increasingly common element of modern civil strife in numerous parts of the world, but under the government's view no individual subjected to that horrific treatment is eligible to be considered for a discretionary grant of asylum. This Court should correct that unsupportable result.

A. Statutory Background

1. *Pre-1980 United States Asylum Law.* The United States had no general law of asylum prior to 1980. Congress in the decades after the Second World War passed piecemeal and context-specific legislation establishing different asylum standards for refugees from particular countries, regions, and conflicts. See, *e.g.*, Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (applying exclusively to refugees who entered Germany or Austria between September 1, 1939 and December 22, 1945, or "who, having resided in Germany or Austria, [were] victim[s] of persecution by the Nazi government"); Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (asylum provisions applicable to refugees from the U.S.S.R. and communist-controlled areas of Eastern Europe); Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 643 § 15(c)(1) (refugees from communist-controlled areas and from the Middle East); Hungarian Refugee Act of 1958, Pub. L. No. 85-559, 72 Stat. 419 (applying exclusively to "refugee[s] from the Hungarian Revolution"); Cuban

Refugee Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (applying exclusively to "native[s] or citizen[s] of Cuba * * * admitted * * * into the United States subsequent to January 1, 1959").

The 1948 Displaced Persons Act (DPA) excluded from eligibility for entry into the United States individuals who "assisted the enemy [i.e., the European Axis powers in World War II] in persecuting civil populations" or "voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against [the Allied forces]." DPA § 2(b), 62 Stat. 1009 (incorporating Annex I to the Constitution of the International Refugee Organization of the United Nations (Annex I), Part I(A) & Part II). The 1953 Act barred issuance of a visa to "any person who personally advocated or assisted in the persecution of any person or group of persons because or race, religion, or national origin." 67 Stat. 406. The other statutes contained no such restriction.

A new asylum statute arose out of the conflicts in Southeast Asia, which resulted in an influx of tens of thousands of refugees to the United States during the 1970s. See Gail P. Kelly, *Coping with America: Refugees from Vietnam, Cambodia, and Laos in the 1970s and 1980s*, 487 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 139 (1986).

One characteristic of those conflicts was that persecutory acts were routinely carried out by conscripts forced against their will to participate in persecution. The International Committee of the Red Cross reported that "tens of thousands of young [Cambodian] men [were] conscripted into armies and irregular forces. * * * During the Pol Pot era, the Khmer Rouge consistently used young people, some so young that 'the gun they carried touched the ground,' to in-

timidate families and carry out executions." The International Committee of the Red Cross, *Country Report Cambodia* 7-8 (1999), *available at* http://www.greenbergreasearch.com/articles/2046/378_cambodia.pdf. Moreover, "[c]ivilian involvement in Cambodian wars * * * did not begin or end with Pol Pot. During the 1970-1975 civil war, commanders in the army of Lon Nol and guerrilla fighters conscripted village youths throughout the nation and fought scores of battles in villages." *Id.* at 24.

Congress passed the Indochinese Refugee Resettlement Act, Pub. L. No. 95-145, 91 Stat. 1223 (1977), to establish standards for the adjustment of status of refugees from Vietnam, Laos, and Cambodia who were paroled into the United States between March 31, 1975 and January 1, 1979. The statute contained a persecutor bar different from the provision in prior acts. It prohibited the Attorney General from granting asylum to

> [a]ny alien who ordered, assisted, or otherwise participated in the persecution of any person because of race, religion, or political opinion shall be ineligible for permanent residence under any provision of this [Act].

Id.§ 105 (codified as amended at 8 U.S.C. § 1255 note § 105).

2. *The Refugee Act of 1980.* Congress at the end of the 1970s recognized that "the piecemeal approach of our government in reacting to individual refugee crises as they occur is no longer tolerable." S. Comm. on the Judiciary, Refugee Act of 1980, S. Rep. 96-256, at 3, *reprinted in* 1980 U.S.C.C.A.N. 141, 143. In an express effort to incorporate the lessons learned from the Cambodian experience broadly across all future

refugee crises, (*ibid.*), Congress passed the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980).

The Refugee Act had two basic objectives. First, Congress intended to conform United States asylum standards with the international standards contained in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968).[1] See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees to which the United States acceded in 1968") (citation omitted).

Second, Congress intended the Act to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449-50 (1987).

Under the standards set forth in the Act, refugees from any nation may remain in the United States by obtaining either a grant of asylum or a withholding of removal. See 8 U.S.C. §§ 1158, 1231. A grant of asylum "permits an alien to remain in the United States and to apply for permanent residency after one year," while a withholding of deportation or re-

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[1] The Protocol incorporates by reference the 1951 United Nations Convention Relating to the Status of Refugees. 189 U.N.T.S. 150 (July 28, 1951), *reprinted in* 19 U.S.T. 6223, 6259, 6264-6276. It was adopted because the Convention "covers only those persons who have become refugees as a result of events occurring before 1 January 1951," and "it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951." *Ibid.*; G.A. Res. 2198 (XXI) (1967) (preamble).

moval "only bars deporting an alien to a particular country or countries." *Aguirre-Aguirre*, 526 U.S. at 419. As long as the statutory criteria are met, "withholding is mandatory unless the Attorney General determines [an] exception[] applies," but "the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [sole] discretion." *Id.* at 420.

In order to receive either type of relief, an alien must be "unable or unwilling to return to * * * [his home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). But not all aliens who demonstrate a well-founded fear of future persecution on such grounds are eligible for asylum or withholding of removal. Congress excluded from eligibility any alien who had himself "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Ibid.*; 8 U.S.C. § 1158(b)(2)(A)(i). See also 8 U.S.C. § 1231(b)(3)(B)(i).[2]

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[2] As originally enacted in the 1980 statute, the persecutor bars to both asylum and withholding of removal used the same language. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), a comprehensive revision of the Nation's immigration laws. That law amended the INA, moving the persecutor bar relating to the withholding of removal from § 243(b)(3)(B)(i) to § 241(b)(3)(B)(i). In addition, it amended the withholding exception's language, replacing the words "on account of" with "because of." Those changes do not affect the issue in this case.

B. Asylum Applicants Increasingly Are Seeking Refuge From Violent Civil Strife Involving Coerced Participation In Persecution.

Violent conflicts around the world today frequently involve civil wars that have as a hallmark coerced participation in armed conflict. Thus, the United Nations recognizes over thirty ongoing conflicts around the world in which more than a quarter million young people have been coerced into violent armed conflict. The Secretary-General, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, ¶ 11, U.N. Doc. A/61/275 (Aug. 17, 2006). As one former child soldier has testified,

> [T]here are thousands of children from ages 8 to 17 in Burma, Sri Lanka, Congo, Uganda, Ivory Coast, Colombia, just to name a few places, that are being forced to fight and lose their childhoods and their families. They are maimed and they lose their humanity, and these are the fortunate ones. Those who are less fortunate are killed in the senseless wars of adults.

Casualties of War: Child Soldiers and the Law: Hearing before the U.S. Sen. Comm. on the Judiciary, Subcom. on Human Rights and the Law, 110th Cong. (2007) (testimony of Ishmael Beah, former child soldier from Sierra Leone); see also *Hearing on the "Material Support" Bar Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) (hundreds of thousands

of child soldiers from African countries are forced to serve in state and opposition armies); Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 Am. U. Int'l L. Rev. 1131, 1131 (2002) ("[T]he majority of refugees in the world today are * * * fleeing civil conflicts in which the distinction between oppressor and oppressed is often unclear." (citing United Nations High Commissioner for Refugees, *Refugees by Numbers* 8 (2000))).

Examples of countries in which combatants force innocent victims to take part in their persecutory acts include:

- Burma (see *Burma Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/ 78768.htm);
- Columbia (see *Columbia Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/ 2006/ 78885.htm);
- El Salvador (see *Doe* v. *Gonzales*, 484 F.3d 445, 447-48 (7th Cir. 2007));
- Guatemala (see *Hernandez* v. *Reno*, 258 F.3d 806 (8th Cir. 2001);
- Iraq (see *Iraq Country Report*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/ 78853.htm (citing occurrences of compelled child participation in violent activities of opposition groups);
- Peru, *Miranda Alvarado* v. *Gonzales*, 441 F.3d 750 (9th Cir. 2006), *modified on reh'g*, 449 F.3d 915 (9th Cir. 2006); *Castaneda-Castillo* v. *Gonzales*, 488 F.3d 17 (1st Cir. 2007);

- Somalia (see *Somalia Country Report, available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78757.htm) (citing reports from previous year that militia groups forced minority groups into forced labor);
- Sudan (see *Sudan Country Report, available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm) (noting forced military conscription of underage men and numerous abuses carried out by security forces).

Asylum claims in the United States show a pattern of increasing numbers of refugees from these countries. In fact, five of these nations – Colombia, Ethiopia, Iraq, Burma, and Somalia – ranked in the top twenty-five source countries for asylum applications granted by the United States in 2006. See U.S. Dep't of Justice, *2006 Statistical Year Book*, J2 (Feb. 2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. El Salvador, Guatemala, and Peru each ranked in the top twenty-five countries represented in immigration court proceedings overall. *Id.* at E2. The United States additionally received over 200 asylum applications in 2006 from several other countries known for forced participation in persecution, including Gambia, the Ivory Coast, Liberia, and Sierra Leone; and nearly 100 asylum applications from the Sudan. *Ibid.*

C. Factual Background

1. *The Ethiopian-Eritrean War.* One civil conflict in which coerced participation occurred with great frequency was the war between Ethiopia and Eritrea, which took place for most of the forty years between the 1960s and 2000, the longest continuous

war in African history. Eritrea's human rights abuses were a well recognized feature of this conflict.

During the war and continuing today, the Eritrean government persecuted individuals on the basis of their religious beliefs, especially singling out Protestant Christians. See U.S. Comm'n on International Religious Freedom. 2004 Annual Report 19-20, *available at* http://www.uscirf.gov/images/stories/pdf/Eritria/2004annualRpt.pdf; U.S. Dep't of State; *Eritrea—International Religious Freedom Report 2007*, *available at* http://www.state.gov/g/drl/rls/irf/2007/90096.htm. Hundreds of individuals were imprisoned for their religious beliefs. The State Department report states:

> Often, detainees were not formally charged, accorded due process, or allowed access to their families. While many were ostensibly jailed for evasion of military conscription, significant numbers were being held solely for their religious beliefs, and some were held in harsh conditions that included extreme temperature fluctuations. There were reports of torture. Many were required to recant their religious beliefs as a precondition of release.

Ibid.; see also U.S. Comm'n on International Religious Freedom, *supra*, at 20 ("[r]eligious repression is alleged to be particularly severe in the armed forces. * * * * [A]ny military personnel found in possession of a Bible reportedly face severe punishment").

Most pronounced among Eritrea's human rights violations is, as the Department of State has documented, Eritrea's "arbitrary arrest and detention" of its citizens in connection with their refusal of or re-

sistance to forced military service. U.S. Dep't of State, *Eritrea Country Report on Human Rights Practices* 2006 (2007) [hereinafter Eritrean Country Report].[3] The Eritrean government routinely "round[ed] [up] young men and women for national service," and "incarcerat[ed] and tortur[ed] family members of national service evaders." *Ibid.* Those put in jail faced "harsh and life threatening prison conditions," including "torture and beatings." *Ibid.*

The Department of State explains that the current Eritrean government still "use[s] * * * deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders," and that "persons detained for evading national service [often] die[] after harsh treatment by security forces." *Eritrean Country Report.* The report includes accounts of "individuals [being] severely beaten and killed during government roundups of young men and women for national service." *Ibid.*

2. *Petitioner's Persecution in Eritrea.*[4] Petitioner Daniel Girmai Negusie was a citizen and resident of Eritrea during the Ethiopian-Eritrean war. One day in 1994 when petitioner was 18 years old, he went to his town's theater to see a movie. J.A. 4. Soldiers surrounded the theatre; when the audience left the theatre at the movie's conclusion, everyone was "apprehended and hand-tied by rope." *Id.* at 4-5. The soldiers shot at anyone who attempted to escape. *Id.*

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[3] The *Eritrean Country Report* is available at http://www.state.gov/g/drl/rls/hrrpt/2006/78733.htm.

[4] The Board of Immigration Appeals upheld the Immigration Judge's finding that petitioner was credible. Pet. 4a. The court of appeals did not address that determination, because it found petitioner's claim of duress irrelevant as a matter of law. Pet. 2a.

at 5. His captors subsequently forced petitioner to perform "hard labor" in a salt mine. *Id.* at 6. Anyone who attempted to escape and was caught was "kept in the sun for three days without food and water." *Id.* at 7-8.

After a month in the salt mines, petitioner was forced to undergo military training for six months. J.A. 9. Following his training, he was pressed into service as a gunner on a naval vessel patrolling the Red Sea. *Id.* at 10-11. He testified that during this service, he never fired the gun at any person or vessel. See Pet. App. 16a.

Following his conscription in the Eritrean navy, petitioner was discharged and took a job as a painter aboard a ship. J.A. 11. In 1998, however, the conflict with Ethiopia re-erupted, and petitioner was conscripted once again. *Id.* at 12, 15, 18. Petitioner refused to fight because he considered Ethiopians his "brothers." *Id.* at 18-19. As a result of his refusal to fight and because he is half-Ethiopian, petitioner was taken to prison, where he was placed in solitary confinement for six months. *Id.* at 19-20. Petitioner remained imprisoned under harsh conditions, forced to perform hard labor, for an additional one and a half years after his solitary confinement. *Id.* at 20-21.

During his imprisonment, petitioner converted to Protestant Christianity, for which he was subjected to additional persecution. J.A. 22-23. At one point, he was forced to roll on the ground in the hot sun while being beaten with a stick every day for two weeks for talking with fellow Christians in the prison. *Id.* at 23-24.

Once petitioner was released from prison in 2001, the prison camp's commanding officer directed him

to assume "duties as a prison guard and also in the surveillance * * * of the base." J.A. 26. Petitioner was never permitted to leave the military base and would have been executed had he tried to flee. *Id.* at 38-40. In fact, petitioner testified that at least two of his friends were killed in the course of trying to escape from their forced service as guards. *Id.* at 41-42.

While forced to serve as a prison guard, petitioner was told to "bring[] out the prisoners from their cells and punish[] them." J.A. 33-34. Petitioner, however, "objected [and] declined taking such an action of punishing the prisoners" because it offended his beliefs as a Christian. *Id.* at 34. Instead, in the face of threatened execution (*id.* at 37-38), when ordered to punish and torture the prisoners, petitioner "did the [opposite] of what they ordered me [to do]" (*id.* at 34). Rather than denying the prisoners showers, for instance, he permitted them to take showers in secret at night. He also gave the prisoners food, water, and cigarettes in secret, and let them out into the fresh air at night. *Id.* at 35-38. Although he witnessed torture take place, he never himself beat or killed anyone during his forced service. *Id.* at 35-37.

After almost four years of coerced service at the military base and prison, petitioner resolved to risk death in escape rather than continue coerced service for his captors. J.A. 40, 42. He fled in the dark of night to a friend's house. *Id.* at 43. Each night for the next five nights, he and another escapee swam out to a container ship anchored in the Red Sea. *Id.* at 45-48. On the fifth night, they finally opened a ventilation shaft and sneaked into a container, bringing food and water with them. *Id.* at 48-49. Over one month later, petitioner arrived in the United States and filed for asylum. *Id.* at 50.

D. Proceedings Below

1. *Administrative Proceedings.* The Immigration Judge (IJ) rejected petitioner's asylum claim and his claim for withholding of removal. Pet. App. 9a-20a. The IJ found that petitioner was credible and that there was "no evidence to establish that [petitioner] is a malicious person or that he was an aggressive person who mistreated the prisoners." *Id.* at 16a. Nevertheless, the IJ determined that "the very fact that he helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [petitioner] from relief." *Id.* at 16a-17a (citing *Fedorenko* v. *United States*, 449 U.S. 490 (1981); *Bah* v. *Ashcroft*, 341 F.3d 348 (5th Cir. 2003) (per curiam)).

The Immigration Judge went on to find that "it is more likely than not that [petitioner] would be tortured if returned to his native land" because he was a deserter from the armed forces and because of his religion, his political opinion, and his nationality. Pet. App. 20a; see also *id.* at 18a-19a. He based this conclusion on the Eritrean government's use and threatened use of deadly force and torture. *Id.* at 19a. He granted petitioner's request for deferral of removal under the Convention Against Torture, due to the torture that petitioner would again face if returned to Eritrea.[5]

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[5] Deferral of removal is available to those aliens who would qualify for asylum and withholding of removal but for the application of a "mandatory denial" such as the persecutor bar. 8 C.F.R. § 1208.17. Deferral of removal "[d]oes not confer upon the alien any lawful or permanent immigration status in the United States." 8 C.F.R. § 1208.17(b)(1)(i). Without any legal right to be in the country, petitioner may be detained at any

In an unpublished decision, a single panel member of the Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 4a-8a. She determined that "[t]he fact that the [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Id.* at 6a. The panel member reached this conclusion because, in her view, "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution * * *. [I]t is the objective effect of an alien's actions which is controlling." *Ibid.* (internal quotation marks omitted; citing *Matter of Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984)).

The BIA also upheld the IJ's finding that "the Eritrean government, which has a terrible overall human rights record, specifically engaged in mistreatment and torture against army deserters" and that therefore petitioner "is more likely than not to be tortured upon a return to Eritrea by the Eritrean government." Pet. App. 8a. It therefore rejected the government's challenge to petitioner's deferral of removal, because petitioner again would suffer likely torture and threats of death if returned to Eritrea.

2. *The Court of Appeals' Decision.* The court of appeals denied the petition for review of the BIA's decision. Pet. App. 1a-3a. Applying *Bah*, 341 F.3d at 351, the court ruled that "[t]he question whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." Pet. App. 2a.

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time by the Department of Homeland Security and "may be removed at any time to another country where he or she is not likely to be tortured." 8 C.F.R. § 1208.17(b)(2), (c).

In *Bah*, the Fifth Circuit had upheld the application of the persecutor bar to a young man who had been forced to assist the Revolutionary United Front (RUF) insurgency in Sierra Leone, another country torn by violent civil strife. RUF soldiers who had "raped and killed [Bah's] sister" and "incinerated his father" in front of him, offered him "the option to join the RUF or die." 341 F.3d at 349. Bah understandably decided to join. "Bah twice tried to escape * * *. During his second captivity, soldiers poured palm oil on his back and placed him face down with his back towards the sun in order to burn him." *Id.* at 350. Under the constant threat of continued torture and death, Bah was coerced into committing a number of violent acts, including the taking of lives. *Ibid.* In his third escape attempt, Bah reached the United States where he applied for asylum.

The Fifth Circuit upheld the BIA's determination that the persecutor bar precluded a grant of asylum to Bah despite "his forced recruitment" and forced participation in the activities of the RUF. *Bah*, 341 F.3d at 351. "The syntax of the statute," the court concluded, "suggests that the alien's personal motivation is not relevant. * * * Bah participated in persecution, and the persecution occurred because of an individual's political opinions." *Ibid.*

The court below concluded that *Bah* controlled the disposition of petitioner's appeal in this case. It acknowledged that petitioner "did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, [and] did favors for prisoners." Pet. App. 2a-3a. The court nevertheless held that "[t]he question whether an alien was compelled to assist authorities [in persecution] is irrelevant." *Id.* at 2a (citing *Bah*, 341 F.3d at 351). Instead, "the inquiry should focus

'on whether particular conduct can be considered assisting in the persecution of civilians'" without consideration of whether the alien was forced under threat of death or torture to provide that assistance. *Ibid.* (quoting *Fedorenko*, 449 U.S. at 512 n.34).

SUMMARY OF ARGUMENT

A refugee fleeing persecution should be eligible for asylum and for withholding of removal when the persecution that he suffered included being forced upon threat of death or serious injury to participate in the persecutory acts of his oppressors. The statutory "persecutor bar"—which provides that a person who "ordered, incited, assisted, or otherwise participated in persecution" (8 U.S.C. § 1101(a)(42)) may not seek a discretionary grant of asylum or obtain withholding of removal—is not triggered by such involuntary acts.

The critical term in the statute—"persecution"—is not simply a description of objective conduct; it requires in addition that the actor's state of mind satisfy a standard of moral offensiveness. That standard is met when the conduct is motivated by animus toward the persecuted group or when the actor is indifferent but decides to participate voluntarily, whether for financial gain or simply because he is unwilling to exercise his ability to choose a different course. Involuntary acts that are the product of threats of death or serious injury are not a voluntary choice at all and therefore occupy a far different place on the scale of moral offensiveness.

Indeed, courts have upheld asylum claims by individuals who would be forced to participate in persecution if returned to their countries, finding that these individuals are therefore subject to "persecution." If forcing individuals to engage in persecutory

acts is itself persecution, Congress could not have meant to withdraw asylum eligibility for those very same persons. That would be akin to labeling the victim of a crime as an aider and abettor of that crime, a conclusion that this Court has squarely rejected.

The interpretation that is plain from the language of the statute also is supported by the general principle, well-established in both criminal and civil law, that individuals should not suffer serious adverse consequences on the basis of involuntary acts. Because Congress legislated against this background principle, and the persecutor bar contains no indication that Congress intended to override it, the provision should not be interpreted to apply to coerced conduct.

The statutory context provides still more support for this conclusion. Congress enacted the persecutor bar to conform United States law to the 1967 United Nations Protocol Relating to the Status of Refugees. That Protocol's persecutor bar is triggered by criminal conduct, and therefore incorporates criminal law concepts such as an excuse based on duress. The implementing statute should be read in the same manner.

Moreover, Congress enacted the statute containing the persecutor bar to apply generally to asylum claims, altering its earlier practice of conflict and country-specific legislation, and sought to confer broad discretion on the Attorney General to resolve asylum claims arising from a variety of factual contexts. Construing the persecutor bar to exclude involuntary acts precludes the Attorney General from exercising his discretion with respect to an increasingly common characteristic of asylum-seekers.

The government and the Fifth Circuit base their conclusion that the persecutor bar does encompass involuntary acts on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which construed a provision of the 1948 Displaced Persons Act governing grants of visas to individuals displaced by World War II. *Fedorenko* is entirely inapplicable here. It construed the provision of a different statute with different statutory language enacted in a very different statutory context.

The Displaced Persons Act addressed a specific set of refugees in the context of a particular—and particularly horrific—crime against humanity. The provision at issue here, by contrast, was adopted to conform United States law to the 1967 Protocol and to provide the Attorney General with broad discretion to address a wide variety of asylum claims. There simply is no basis for applying *Fedorenko*'s rule in this very different context.

The Court's decision in *Fedorenko* pointed to the particular structure of the controlling provision: the restriction had two subsections, one addressing persecution of civilians and one addressing assistance to enemy forces. The word "voluntarily" was included in only the latter subsection. The Court found that the exclusion of "voluntarily" from the subsection relating to persecution of civilians was sufficient to establish congressional intent to override the general principle against imposing serious adverse consequences on the basis of involuntary acts. Because "voluntarily" does not appear in the persecutor bar provision at issue here, however, this reasoning is inapplicable to this case. The Court should therefore construe the persecutor bar in accordance with its common sense meaning and the well-settled background legal principle.

ARGUMENT

THE PERSECUTOR BAR IS NOT TRIGGERED BY INVOLUNTARY CONDUCT THAT IS THE PRODUCT OF CREDIBLE THREATS OF DEATH OR SERIOUS BODILY HARM

The statutory provisions at issue in this case provide no basis for the court of appeals' counter-intuitive conclusion that an individual subjected to persecution, and forced by his oppressors—as part of that persecution—to engage in persecutory acts against others, is not eligible to seek a discretionary grant of asylum. To the contrary, Congress clearly intended to preserve such individuals' eligibility for asylum. This Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), on which the government and the lower court principally rely, provides no support for their contrary position. Rather, the different characteristics of the Displaced Persons Act provision interpreted in *Fedorenko*—characteristics that are not present here—make clear that the Court's decision has no application to the issue in this case.

A. The Statutory Provisions Do Not Encompass Involuntary Conduct.

Each of the tools of statutory analysis utilized by this Court—the words Congress chose, the background legal principles against which Congress acted, the statutory context, and the general rule that ambiguous statutes must be construed in favor of an asylum-seeker—establishes that the persecutor bar does not encompass involuntary acts.

1. The Plain Language Makes Clear That Involuntary Acts Do Not Implicate The Persecutor Bar.

"The starting point in discerning congressional intent is the existing statutory text * * *." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). The plain meaning of the words Congress used leaves no doubt that involuntary acts cannot provide grounds for invoking the persecutor bar's prohibition.

The bar applies to an individual who has "ordered, incited, assisted, or otherwise participated in the persecution of any person" on the basis of a prohibited category. 8 U.S.C. § 1158(b)(2)(A); see also *id.* §§ 1101(a)(42) & 1231(b)(3)(B)(i).

The provisions' critical term—"persecution"—is defined as "the action of pursuing or persecuting a person or group with hostile intent." OXFORD ENGLISH DICTIONARY 591 (2d ed. 1989). The Latin root of "persecution," *prosequ*, means "to seek out, to pursue, to follow with hostility or malignity * * * on religious grounds." *Ibid.*

Whether one person has "persecuted" another thus does not turn solely on his or her objective conduct; rather, the actor's conduct, his state of mind and other relevant facts must satisfy a standard of moral offensiveness. Indeed, the lower courts have expressly recognized this requirement in defining the proof of "persecution" required to demonstrate eligibility for asylum. The Tenth Circuit, for example, has defined persecution in this context as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) ***in a way regarded as offensive***." *Chaib* v. *Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005) (internal quotation marks omitted;

emphasis added); see also *Karouni* v. *Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005).

Involuntary acts that are the product of threats of death or serious injury plainly do not satisfy that statutory standard. Such coerced conduct occupies a far different place on the scale of moral offensiveness than conduct that is motivated by animus toward the persecuted group and even actions by persons who are indifferent toward the persecutory purpose but decide nonetheless to participate voluntarily, whether to curry favor with the instigators, or to obtain financial rewards or some other benefit, or simply because they are not willing to exercise their ability to choose a different course. Individuals whose actions are coerced are not able to make a voluntary choice at all. They therefore cannot be said to have engaged in persecution.

Instead of employing the term "persecuted," which might have produced uncertainty about the types of conduct that constituted "persecut[ing]," the statute describes with more particularity the category of conduct that triggers the bar by applying a series of verbs to "persecution": "ordered, incited, assisted, or otherwise participated in the persecution of any person." The listing of these verbs does not vitiate the requirement of moral offensiveness that is inherent in the term "persecution."

To begin with, "participated in * * * persecution" plainly has the same meaning as "persecuted": having decided to employ the series of verbs, Congress needed a catch-all term covering the commission of persecution itself, and this phrase fills that requirement. "Participated" does not override the requirements inherent in "persecution." Rather, as this Court recognized in *Reves* v. *Ernst & Young*, 507

U.S. 170, 177-79 (1993), "participate" is limited by the "context" in which it appears. In *Reves*, that term took on the limitations of the term "conduct" (requiring "an element of direction"); here, it takes on the limitations of "persecution" (requiring moral offensiveness).

Next, the statutory formulation makes clear that the other listed verbs merely describe different ways of participating in persecution—"ordered, incited, assisted, ***or otherwise participated*** in the persecution" (emphasis added). Thus, Congress simply wished to make clear that the more specifically described conduct constituted "participat[ing]"; it did not mean to define new categories of conduct. And, as we have discussed, a person can participate in persecution only if his conduct is morally offensive.

Even taken on their own terms, moreover, Congress's inclusion of these additional verbs provides no basis for applying the persecutor bar to individuals whose actions do not exhibit the requisite moral offensiveness. Under federal criminal law, the imposition of liability on a person who "aids, abets, counsels, commands, induces or procures [the] commission" (18 U.S.C. § 2(a)), still requires proof that such individuals act with the same degree of culpability as a principal engaged in the particular criminal conduct. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949) ("[i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to

make it succeed'") (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.)).[6]

More fundamentally, extending the persecutor bar to situations in which an individual's acts are coerced simply does not comport with "the language as we normally speak it" or "what [Congress's] words will bring to the mind of a careful reader." *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007); see also *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931) (rejecting statutory interpretation that had no relation to the "popular picture" that the "phrase under discussion calls up").

The formulation "ordered, incited, assisted or otherwise participated in * * * persecution" plainly conveys the idea of a morally ***blameworthy*** actor. Under the Fifth Circuit approach endorsed by the government, however, these words would apply to individuals who are utterly ***blameless***.

For example, attacking an armed persecutor in self-defense could be described as having the "objective effect" of furthering persecution if, as a result, the persecutor fired his gun and killed another person whom the persecutor was intent on oppressing. But the conclusion that the person who was impelled

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[6] As this Court has observed, the doctrine of aiding and abetting "has been at best uncertain in application" to civil claims with cases outside the securities law context "'largely confined to isolated acts of adolescents in rural society.'" *Cent. Bank* v. *First Interstate Bank*, 511 U.S. 164, 181 (1994) (citation omitted). Courts that have addressed the issue have required a showing of culpability similar to this Court's decision in *Nye & Nissen*. See, *e.g.*, *E. Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (Posner, J.) ("one who aids and abets a fraud, *in the sense of assisting the fraud and wanting it to succeed*, is himself guilty of fraud") (emphasis added).

to defend himself therefore "assisted or otherwise participated in persecution" would be bizarre, precisely because no one would see him as a morally responsible agent. See, *e.g.*, *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (overturning application of the persecutor bar to an asylum-seeker whom the BIA had concluded had "participated in" persecution as a matter of "self defense").

One technique used frequently by persecutors is to force members of the group they are persecuting to engage in unwanted and offensive sexual behavior with other members of the oppressed group. *"My Heart Is Cut": Sexual Violence by Rebels and Pro-Government Forces in Côte d'Ivoire*, 19 Human Rights Watch, No. 11(A) (2007), *available at* http://hrw.org/reports/2007 /cdi 0807/cdi0807web.pdf (detailing use of forced incest as form of persecution in ethnic warfare). Under the government's strained reading of the persecutor bar, such persons would be deemed to be "participating in" persecution of one another.

Such individuals plainly are not persecutors; they are victims of persecution. Indeed, lower courts have reached that conclusion in addressing claims for asylum by aliens arguing that they would be subject to "persecution" if returned to their home countries because they would be forced to engage in persecutory acts. Finding that such coercion would itself constitute "persecution," these courts have found such individuals eligible for asylum. See, *e.g.*, *Islami* v. *Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005) (asylum applicant's "fear of retribution for refusing to participate in a military known to perpetrate crimes against humanity * * * clearly rose to the level of past persecution"); *Vujisic* v. *INS*, 224 F.3d 578 (7th Cir. 2000) (same); *Ramos-Vasquez* v. *INS*, 57 F.3d 857 (9th Cir.

1995) (reversing denial of asylum to individual who feared being forced to commit crimes against humanity).

Because—as these courts have indicated—forcing individuals to engage in persecutory acts is itself persecution that makes such individuals eligible for asylum, Congress could not have meant the persecutor bar to withdraw asylum eligibility from those very same persons. Saying that the acts that render someone a victim of persecution also make him a "participa[nt] in" it is akin to the flawed logic rejected by the doctrine that a victim of a crime cannot be convicted of "aiding and abetting" that very crime. See generally *United States* v. *Pino-Perez*, 870 F.2d 1230, 1232 (7th Cir. 1989) (en banc) (Posner, J.) (neither the "the victim of [a] crime" nor "members of a group that the criminal statute seeks to protect" can be charged with aiding and abetting violation of that criminal offense under 18 U.S.C. § 2) (citing *Gebardi* v. *United States*, 287 U.S. 112, 123 (1932)). This Court should reject such an irrational construction of the statute.

2. *Statutes That Impose Serious Adverse Consequences Are Presumed To Exclude Involuntary Conduct.*

Even if Congress's intention to exclude involuntary conduct from the persecutor bar were not plain from the statutory language, the court of appeals' conclusion that duress is "irrelevant" is insupportable. The general principle that individuals should not suffer serious adverse consequences on the basis of involuntary acts—either because coerced conduct is not a legally cognizable "act" or because duress is a defense—is so well-established in our legal system that statutes should not be interpreted to the con-

trary absent an express indication that Congress intended to override this fundamental principle. Because there is no such express indication here, the Court should hold that the persecutor bar does not encompass acts coerced under threat of death or serious bodily harm.

The Court has "recognize[d] that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law, and that therefore a defense of duress or coercion may well [be] contemplated by Congress" even though it has not expressly provided for one. *United States* v. *Bailey*, 444 U.S. 394, 415 n.11 (1980) (citation omitted); see also *Dixon* v. *United States*, 548 U.S. 1, 2 (2006); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("mere omission from [the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced").

This presumption extends to noncriminal laws that result in serious consequences for an individual. Courts have recognized, for example, that duress is relevant to civil tax fraud (see *Furnish* v. *Comm'r*, 262 F.2d 727 (9th Cir. 1958)); civil contempt (see *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881 (7th Cir. 1989)); and civil penalties for violating export sanctions (see *Office of Foreign Asset Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004)). In none of these civil statutes had Congress expressly excluded liability based on involuntary acts, but courts presumed that they nonetheless did not encompass such conduct.[7]

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[7] See also RESTATEMENT (SECOND) OF CONTRACTS §§ 174 & 175 (1981) (contract is void if manifestation of assent is compelled by physical duress and voidable if manifestation of assent is in-

Indeed, both courts and the government have also recognized the presumption of excusing conditions, including duress, with respect to other provisions of the immigration laws. The Eleventh Circuit, for example, has repeatedly recognized duress as a defense to liability for carrier fines under 8 U.S.C. § 1323, which prohibits the bringing of illegal aliens into the country. *Lyden* v. *Howerton*, 783 F.2d 1554, 1557 (11th Cir. 1986) ("It is now the settled law of this circuit that duress is available as a defense to violations of 8 U.S.C. § 1323."); *United States* v. *Sanchez*, 520 F. Supp. 1038 (S.D. Fla. 1981), *aff'd*, 703 F.2d 580 (11th Cir. 1983). See also Immigration and Naturalization Service, General Counsel's Office, *Standard for Prosecutorial Discretion under Section 273 of the Immigration and Nationality Act*, Genco Op. No. 93-66, 1993 WL 1504013, at n.7 (1993) (recognizing that both duress and absence of *mens rea* defeat liability under this provision).

The Secretary of Homeland Security has determined that the exclusion established by 8 U.S.C. § 1182(a)(3)(B)—which, among other things, bars admission of aliens who have provided material support to terrorist organizations—"shall not apply with respect to material support ***provided under duress*** to a terrorist organization * * * if warranted by the totality of the circumstances." 72 Fed. Reg. 26138-02 (May 8, 2007) (emphasis added). Like the very similarly worded persecutor bar, Section 1182(a)(3)(B) contained no express reference to duress at the time

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duced by threats of use of physical force). See generally H.L.A. Hart, *Punishment and Responsibility* 83 (1968) (drawing "attention to the analogy between conditions that are treated by criminal law as excusing conditions and certain similar conditions that are treated in another branch of law as invalidating certain civil transactions").

this exception was adopted by the Secretary. The Secretary nonetheless concluded that the statutory language did not preclude an exception for involuntary acts.[8]

This broad legal recognition of duress strongly supports the application of this general principle to the persecutor bar. Indeed, the persecutor bar carries consequences for asylum-seekers that are far harsher than those at issue in many of the cases cited above. When the government imposes a categorical bar on the granting of asylum and withholding of removal on a refugee like petitioner, it may lead to returning him to forms of treatment that no federal criminal statute would ever countenance. See, *e.g.*, *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile." (internal quotation marks omitted; citing *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947)); *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J. concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.").

Against this background, there is no basis for exempting the persecutor bar from this general principle. The intent to impose serious adverse consequences based on involuntary acts cannot be imputed

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[8] Congress subsequently codified the relevance of the duress defense to application of the "material support" bar. See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691, 121 Stat 1844, 2364 (Dec. 26, 2007) (codified at 8 U.S.C. § 1182).

to Congress absent an unambiguous and explicit indication that it meant to disregard principles of blame so "universal and persistent" in American law. *Morissette*, 342 U.S. at 250. The persecutor bars contain no such indication.

3. The Statutory Context Confirms That The Persecutor Bar Does Not Apply To Involuntary Acts.

The court of appeals' conclusion that duress is "irrelevant" not only does violence to the natural reading of the persecutor bar's text. It also is wholly inconsistent with the context in which Congress acted when it enacted the persecutor bar in the 1980 Refugee Act. *First*, as this Court has recognized, Congress sought to conform domestic law to U.S. treaty obligations—and those obligations do not permit imposition of a persecutor bar on the basis of involuntary acts. *Second*, Congress was responding to the limits of prior, conflict-specific statutes and sought to grant flexible asylum authority that would allow the Attorney General to respond to a myriad of different factual contexts. Precluding the Attorney General from exercising his discretion when an asylum applicant has been coerced to engage in persecution significantly limits that flexibility, especially in view of the frequency with which persecutors use such coercion as a tool for accomplishing their goals.

a. "'[O]ne of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968." *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999) (citation omitted; quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987)).

The Protocol essentially incorporates the terms of the 1951 United Nations Convention Relating to the Status of Refugees. See note 1, *supra*. The Convention exempts from asylum persons who have "committed a crime against peace, a war crime, or a crime against humanity" or "committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee" or have "been guilty of acts contrary to the purposes and principles of the United Nations." Art. I(F). By stating that a disqualification for engaging in persecutory conduct occurs when the individual has committed "crime[s]"—"war crime[s]" or "a crime against humanity"—the Convention makes clear that involuntary acts do not trigger the persecutor bar.

That conclusion is confirmed by the U.N. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, which this Court has recognized "provides some guidance in construing the provisions added to the INA by the Refugee Act." *Aguirre-Aguirre*, 526 U.S. at 427.

Of particular relevance here, at the time Congress drafted the Refugee Act, the Office of the High Commissioner for Refugees had authoritatively interpreted the Protocol's "exclusion clauses" to apply only to asylum-seekers whose "acts [are] of a criminal nature," including acts of "instigators and accomplices." U.N. High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/IP/4Eng/Rev.1 ¶ 162 (reedited 1992) [hereinafter *Handbook*].

In evaluating the applicability of the exclusion clauses, moreover, the *Handbook* stated "all the relevant factors—including any mitigating circumstances—*must* be taken into account." *Id.* ¶ 157 (emphasis added). Finally, "due to their nature and the serious consequences of their application to a person in fear of persecution," the *Handbook* admonished that "the exclusion clauses should be applied in a restrictive manner." *Id.* ¶ 180.

Congress thus was aware at the time it adopted the Refugee Act that the international legal standards with which it sought to conform United States law permitted exclusion only for criminal acts and required consideration of "mitigating circumstances" such as duress. The only logical conclusion is that, in drafting the Refugee Act, Congress did not intend to impose the persecutor bar on the basis of involuntary acts. Any other result would frustrate Congress's goal of bringing United States law into conformity with international standards.[9]

b. Prior to the adoption of the Refugee Act, Congress authorized grants of asylum on a conflict-specific basis; each statute applied only to refugees from specific conflicts or nations. See pages 4-6, *su-*

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[9] In 2003, the U.N. High Commission for Refugees issued guidance elaborating on the *Handbook*, explaining that the rationale for the exclusion clauses is that "certain acts are so grave as to render their perpetrators undeserving of international protection as refugees." Thus the persecutor bar applies only to "responsib[le]" aliens who act purposefully, an element that may be defeated by traditional "defenses to criminal responsibility" including "duress." U.N. High Commission for Refugees, *Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003).

pra. The Refugee Act for the first time sought to create a system applicable to all future conflicts to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449-50.

In determining how to address in the Refugee Act the status of aliens alleged to have engaged in persecution, Congress could look to several approaches in prior legislation. First, the Displaced Persons Act, which applied to refugees from post-war Germany and Austria; second, the language of the Refugee Relief Act; third, the statutes applicable to refugees from Hungary and Cuba; and fourth, the Indochinese Refugee Act. See pages 5 & 6, *supra*.

Congress selected the fourth—and most recent—alternative. Recognizing that the new statute would apply to refugees who had experienced very different types of persecution, it is likely that Congress made that choice because it sought to maximize the ability of the Attorney General to exercise discretion to adapt the country's asylum policy to the myriad different factual circumstances that asylum-seekers can present—including the increasingly-common situation in which part of the persecution to which individuals are subjected is requiring them to engage in persecution themselves. See pages 9-13, *supra*.

The Fifth Circuit's rule ignores the historical context in which Congress drafted the Refugee Act. The fact that an asylum-seeker like petitioner was persecuted paradoxically renders him ineligible, rather than eligible, for relief, starkly conflicts with Congress's goal of providing flexible discretionary authority sufficient to reach victims of all of the various types of persecution.

4. Any Ambiguity In The Persecutor Bar Must Be Resolved In Favor Of An Asylum-Seeker.

This Court has followed a "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449 (citations omitted); see also *Errico*, 385 U.S. at 225; *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). Like the rule of lenity in criminal law, this canon of construction "strikes the appropriate balance between the legislature * * * and the court" (*Liparota* v. *United States*, 471 U.S. 419, 427 (1985)), ensuring that Congress defines the circumstances under which the harsh measure of deportation is to apply.

In cases where this Court believes that an asylum statute's language admits of more than one interpretation, it thus "will not assume that Congress meant to trench on [asylum-seekers'] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan*, 333 U.S. at 10. If Congress's intent conflicts with the more narrow reading, Congress can utilize the "simple remedy" of "insertion of a brief appropriate phrase, by amendment, into the present language" of the persecutor bar. *Bifulco* v. *United States*, 447 U.S. 381, 401 (1980). Ultimately, if the persecutor bar is to be extended in a manner inconsistent with common meaning and settled legal principles, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Ibid.*

5. *Construing The Persecutor Bar To Exempt Involuntary Conduct Will Not Limit The Government's Ability To Exercise Discretion In Immigration Decisions.*

Every individual eligible for asylum is not entitled to receive it. "[T]he decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [sole] discretion." *Aguirre-Aguirre*, 526 U.S. at 420. For that reason, a holding by this Court that the persecutor bar does not encompass involuntary conduct need not require the grant of asylum to a single alien. It simply will permit the Attorney General to exercise his discretion with respect to these now-eligible aliens.

With respect to withholding of removal, the inapplicability of the persecutor bar would simply prevent the Attorney General from removing an individual to the particular country where the alien has a credible fear of torture or death. The Attorney General would retain the ability to deport that individual to any other "country whose government will accept the alien into that country." 8 U.S.C. § 1231(b)(1)(E). This is the same solution the statute already contemplates for situations where removal to an alien's country of origin is, for whatever reason, "impracticable, inadvisable, or impossible." *Ibid.*

Moreover, the Convention Against Torture already restricts the Attorney General's authority to remove an individual to a country in which he would be subjected to persecution—even if the individual engaged in persecution. That is why petitioner obtained a deferral of removal under the Convention. See page 16 & n.5, *supra*. Thus, although withholding of removal does impose some additional restric-

tions on the government, the practical impact on the government's authority to remove an alien to whom the Attorney General determines not to grant asylum is not substantial.

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This Court has not specified the elements of proof of involuntariness in the criminal context. *Dixon*, 548 U.S. at 4 n.2. Generally, the lower courts have concluded that three elements are required: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm." *United States* v. *Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007) (internal quotation marks omitted), *cert. denied*, 128 S. Ct. 1442 (2008). See also *United States* v. *Gamboa-Cardenas*, 508 F.3d 491, 505 (9th Cir. 2007); *United States* v. *Naovasaisri*, 150 Fed. App'x 170, 174 (3d Cir. 2005).[10]

Even under this criminal law standard—a standard likely more demanding that what would be needed to satisfy the immigration laws—the proof adduced by petitioner is plainly sufficient. There is no question that petitioner suffered under the constant and immediate threat of death or serious bodily harm. The torture he previously underwent and the executions he witnessed confirmed that these threats would be carried out. See pages 15-16, *supra*. These

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[10] The threat of death or seriously bodily harm may be directed against the person who engaged in the involuntary acts or against a third party, such as a family member, to coerce the individual to engage in those acts. See, *e.g.*, *United States* v. *Otis*, 127 F.3d 829, 835 (9th Cir. 1997) (duress instruction appropriate when defendant's father was kidnapped to compel defendant to engage in criminal activity).

facts establish that petitioner's conduct was involuntary.

Even if the Court concludes that proof of coercion is not sufficient to render the persecutor bar inapplicable, and that it simply is one factor to consider in determining whether an individual engaged in persecution (see *Hernandez* v. *Reno*, 258 F.3d 806, 814 (8th Cir. 2001)), the bar would not apply to petitioner. Like Hernandez, petitioner endured the most extreme of threats. Petitioner's conduct, however, remained minimally offensive. Petitioner never shot anyone and sought to assist those who were being persecuted. On balance, the coercive force of the threats significantly outweighs the persecutory conduct identified by the Immigration Judge.

B. *Fedorenko* v. *United States* Provides No Support For The Court Of Appeals' Holding That The Bar Encompasses Involuntary Acts.

The government rests its interpretation of the persecutor bar largely on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which held that a Nazi concentration camp guard was ineligible for asylum despite his claim that he had not volunteered to perform that task. Because *Fedorenko* interpreted a different statute with different language in a different statutory context—and could not and did not establish a general principle applicable to all immigration laws—*Fedorenko* is wholly inapplicable here.

The issue in *Fedorenko* was whether a man who had lied about his service as a Nazi concentration camp guard should be stripped of his citizenship under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), which mandates

revocation of citizenship that was "illegally procured or * * * procured by concealment of a material fact or by willful misrepresentation."

Fedorenko maintained that the misrepresentation was not material because he would have been eligible for immigration under the Displaced Persons Act (DPA), notwithstanding his concentration camp service. This Court disagreed, concluding that he would properly have been denied citizenship under Section 2(a), which excluded from the definition of "displaced persons" individuals who had "assisted the enemy [i.e., the European Axis powers in World War II] in persecuting civil populations * * *." Annex I to the Constitution of the International Refugee Organization of the United Nations (Annex I), Part II, § 2(a) (incorporated by reference, DPA § 2(b)).

The Court rejected Fedorenko's claim that because he had not volunteered to serve as a guard, the DPA's persecutor exception should not apply. *Fedorenko*, 449 U.S. at 500. Though Federenko was a Ukranian prisoner of war, he was never threatened with torture or death. In fact, he was paid, received a merit award for his service, admitted to shooting at fleeing prisoners, and took regular leave from the concentration camp without ever attempting to escape.

In these circumstances, the Court held that under the "plain language of the Act, * * * an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512. The Court supported this conclusion by pointing to the next subsection of the relevant provision, which barred from immigration eligibility individuals who "*voluntarily* assisted the enemy forces since the out-

break of the Second World War in their operations against [the Allied forces]." Annex I Part II, § 2(b) (emphasis added) (incorporated by reference, DPA § 2(b)). The Court reasoned that "[u]nder traditional principles of statutory construction, the deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Fedorenko*, 449 U.S. at 512 (emphasis in original).

Fedorenko is inapplicable here for three reasons.

First, this case does not involve the provision of Displaced Persons Act at issue in *Fedorenko*. Rather, it arises under an entirely different statute (the Refugee Act) enacted more than three decades later. Congress did not incorporate into the Refugee Act the language it had adopted in the Displaced Persons Act. Rather, it employed different language that had its origin in a different statute, the Indochinese Refugee Resettlement Act. See page 6, *supra*. In enacting the Refugee Act in 1980, moreover, Congress sought to conform U.S. law to the Nation's treaty obligations—treaty obligations that did not exist at the time the Displaced Persons Act was enacted. Those treaty obligations preclude the imposition of a persecutor bar on the basis of coerced acts. See pages 32-34, *supra*.[11]

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[11] The government argues (Opp. 8-9) that the definition of "refugee" in the relevant treaty (the 1967 Protocol, which adopts the definitions of the 1951 Convention) was based on "the same source as the definition Congress used in the DPA" and that *Fedorenko* therefore is controlling here. Although both the Protocol and the DPA do point to the definition of refugee in the 1946 Constitution of the International Refugee Organization, there is a critical difference between the two. The DPA defines

Second, the Displaced Persons Act was adopted to address a unique historical event. It applied only to individuals "who on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria, or Italy, and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria"; German citizens who were "persecut[ed] * * * or detained" by "the Nazi government," or "obliged to flee such persecution"; and "native[s] of Czechoslovakia who ha[ve] fled as a direct result of persecution or fear of persecution from that country since January 1, 1948." DPA § 2(d).

The need to specify the domain of the statute with such exacting precision, of course, reflected the harsh realities of post-World War II Europe. The death toll of the Holocaust is estimated at 6 million Jews alone, with some 5 million other ethnic and social minori-

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"displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization ***and who is the concern of the International Refugee Organization***." DPA § 2(b) (emphasis added). The persecutor bar is not contained in the IRO Constitution's definition of "refugee"; rather, it is part of the definition of persons who "are the concern of the International Refugee Organization." See IRO Constitution Annex I, Part I(A) (definition of refugee) & Part II.2 (persecutor bar). Because the Protocol incorporates only the IRO Constitution's definition of refugee and does not require that such individuals also be "the concern" of the IRO (see 1951 Convention, Art. I(A)(1)), the Protocol does not adopt the DPA's persecutor bar. Rather, as we have discussed (see page 33, *supra*), the persecutor bar in the Convention is a separate provision (Art. I(F)) that specifically characterizes the disqualifying conduct as "crime[s]"—making clear that involuntary acts are not included.

ties and political resisters of Nazism. Justifying the DPA's uncompromising stance toward concentration camp prison guards, a DPA administrator who testified as an expert witness in *Fedorenko* explained, "'the crime against humanity that [was] involved in the concentration camp puts it into a different category.'" 449 U.S. at 510 n. 32.

While the DPA was meant to deal with a particular—and particularly heinous—crime against humanity in a category of its own, the Refugee Act was meant to reflect principles that would guide asylum policy generally with respect to a variety of conflicts. See pages 34-35, *supra*.[12]

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[12] Furthermore, there are significant differences between the conduct engaged in by Fedorenko and by petitioner. Fedorenko was a very enthusiastic concentration camp guard. Multiple survivors testified that they saw him beat prisoners and shoot others to death; one testified that Fedorenko was the guard who assaulted him with "an iron-tipped whip." 449 U.S. at 498 n.12. Fedorenko might well have been "forced" to serve as a guard insofar as he was conscripted to do so, but there was no evidence that he submitted only because of threats of death and torture, much less that he ever resisted the Nazis. On the contrary, "he was paid a stipend and received a good service stripe from the Germans, and * * * was allowed to leave the camp regularly [and] never tried to escape." *Id.* at 500. In addition, unlike petitioner, Fedorenko covered up his past and lied to U.S. immigration officials when applying for entry into the United States.

Petitioner's guard duty, on the other hand, was coerced by torture and threats of future torture. Indeed, it is not disputed that petitioner's captors *did* in fact torture him when they were dissatisfied with his behavior, beating him while forcing him to roll on the ground for days in heat. Moreover, petitioner was himself a prisoner: he certainly was not *paid* for his service, and could not leave the prison without risking execution. Petitioner also did not shoot or beat other prisoners and was beaten for helping those he could.

Third, the *Fedorenko* Court concluded that involuntary acts were encompassed under the subsection addressing persecution of civilians because of the contrast between that subsection and the immediately following provision addressing assistance to enemy forces. That contrast—the inclusion of "voluntarily" in the latter provision but not in the former provision—led the Court to conclude that the Congress that enacted the provision intended to include involuntary conduct within the former provision.

There is no such contrast in the 1980 Refugee Act. "Voluntarily" does not appear anywhere in the persecutor bar provisions. Accordingly, there is no expression of congressional intent to override the plain meaning of "persecution" and the general principle against imposing serious adverse consequences on the basis of involuntary acts.

Under the DPA, moreover, once a person was found to be eligible for a visa, he or she was entitled to the visa, subject to quota and priority limitations. The statute did not provide for the subsequent exercise of discretion with respect to persons eligible for a visa. In that circumstance—given the enormity of the crime against humanity—it is understandable that Congress decided to encompass involuntary acts within the prohibition.

The Refugee Act, by contrast, does provide for the exercise of discretion before an individual may be eligible to stay in the United States on a permanent basis. See pages 7-8, *supra*. The Attorney General may determine that the particular facts of an individual's case make a grant of asylum inappropriate notwithstanding the fact that the individual's persecutory conduct was coerced. Applying *Fedorenko*'s

approach to that very different statutory structure simply makes no sense.

The government observes (Opp. 7-8) that the statute the Refugee Act amended—the 1952 Immigration and Naturalization Act—contains provisions barring issuance of an immigrant visa to an alien who is a member of a totalitarian party that do not apply if the membership is "involuntary." Because those provisions do not involve asylum or "persecution," however, they do not indicate that the Congress enacting the Refugee Act viewed the term "persecution" standing alone to encompass involuntary conduct. Indeed, forced party membership typically may not be a product of threats of death or injury but rather a result of business or other necessities of daily life; the use of the modifier "voluntarily" therefore was arguably necessary to make clear that even memberships motivated by pressure falling short of coercion were not encompassed within those provisions. It provides no evidence regarding the meaning of "persecution."[13]

Fedorenko's interpretation of different language, contained in a different structure enacted in a different statutory context, does not apply to the Refugee Act. This Court accordingly should reject the government's argument for reflexive application of that decision to this case.

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[13] Moreover, the cited provisions address a different aspect of the immigration laws and were enacted in a different statute twenty-eight years earlier. In *Fedorenko*, by contrast, the provision including the modifier "voluntarily" was separated from the persecutor bar by a single line. See IRO Constitution Annex I, Part II § 2.

C. The Government's Interpretation Of The Persecutor Bar Is Not Entitled To *Chevron* Deference.

The government did not argue in its brief in opposition that its interpretation of the persecutor bar is entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That omission is not surprising, because there is no basis whatever for deference here.

To begin with, when the meaning of a statute is clear, there is no occasion for deferring to the government's interpretation. Judicial deference is appropriate only when "Congress has 'explicitly left a gap for an agency to fill.'" *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-44). The meaning of the persecutor bar is clear from the language Congress used, the background legal principles against which it legislated, the statutory context, and the rule that ambiguous statutes should be construed in favor of asylum applicants. This case presents the prototypical situation in which there simply is no "gap" to fill.

Even if, contrary to our submission, the statutory language were ambiguous, the prerequisites for deference under *Chevron* are absent here. The government's interpretation is not based on reasoned decisionmaking, as *Chevron* requires (see 467 U.S. at 842-44). To the contrary, it rests on a mistaken view about the meaning of this Court's decision in *Fedorenko* and conflicts with pronouncements by the BIA and the Secretary of Homeland Security.

Rather than furnishing independent reasons based upon its expertise, the BIA has done nothing more than mechanically cite precedents involving the DPA, the statute at issue in *Fedorenko*. In *Matter of*

Rodriguez-Majano, 19 I. & N. Dec. 811 (BIA 1988), for example—the BIA's earliest published application of the INA's persecutor exception—the BIA cited *Fedorenko* for the conclusion that "participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. * * * It is the objective effect of an alien's actions which is controlling." 19 I. & N. Dec. at 814-15. That decision did not even acknowledge that *Fedorenko* interpreted an entirely different statute, much less offer a reason for construing the persecutor bar, notwithstanding its different language and context, to embody the approach to involuntary action of the statute construed in *Fedorenko*.

An agency's assertion that it is compelled to adopt a particular interpretation by the statutory text or by judicial precedents is not reasoned decisionmaking. See, *e.g.*, *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96 (1953) (Frankfurter, J.) (overturning agency determination that "was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that [the position adopted by the agency was] desirable"). Because the BIA has failed to do anything more than rely on *Fedorenko*, it plainly has not exercised reasoned decisionmaking to which this Court can or should defer. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 89-90 (1943) (Frankfurter, J.) (refusing to defer to agency interpretation because "the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy. On the contrary, it explicitly disavowed any purpose of going beyond those which the courts had theretofore recognized").

Moreover, because of its reflexive reliance on *Fedorenko*, the BIA has never provided a reasoned ex-

planation for the inconsistencies between its interpretation of the persecutor bar and other statements by the BIA and other government agencies regarding the propriety of imposing penalties in the immigration context on the basis of involuntary acts. "Unexplained inconsistency" is the hallmark of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)), that precludes deference to the government's interpretation. See *Mead*, 533 U.S. at 227.[14]

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[14] Regrettably, this arbitrary and capricious decisionmaking is not uncommon at the BIA. The "'adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.'" *Morales Apolinar* v. *Mukasey*, 514 F.3d 893, 897 (9th Cir. 2008) (quoting *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.)). See also, *e.g.*, *Bah* v. *Mukasey*, No. 07-1715, 2008 WL 2357411, at *10 (2d Cir. June 11,2008) ("we are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework. Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection. The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due"); *N'Diom* v. *Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (observing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort" reaches the federal courts); *Chen* v. *United States Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding the IJ's holding "grounded solely on speculation and conjecture"); *Fiadjoe* v. *Attorney General*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting the IJ's "hostile" and "extraordinarily abusive" behavior toward petitioner "by itself would require a rejection of his credibility finding"); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("it is the [IJ's] conclusion, not [the petitioner's] testimony, that 'strains credulity'"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Kourski* v. *Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004)

For example, in *In re A-H-*, 23 I. & N. Dec. 774 (2005), the Attorney General issued broad guidance for interpreting the persecutor bar at issue in this case, addressing whether "a leader-in-exile of a political movement may be found to have incited, assisted, or participated in acts of persecution in the home country by an armed group connected to that political movement." *Id.* at 785 (internal quotation marks omitted). In the course of his analysis, the Attorney General concluded that "[i]t is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies." *Ibid.*

The Attorney General cited *Hernandez* v. *Reno*, 258 F.3d 806, 814 (8th Cir. 2001), a decision that—as the government itself acknowledges (Opp. 11)—rejects the government's view of the persecutor bar and adopts a "totality of the circumstances" test that acknowledges the relevance of duress. See also Pet. 13-14. Neither the Attorney General, the Secretary of Homeland Security, nor the BIA has *ever* addressed how the government's endorsement in *In re A-H-* of the Eighth Circuit's position on the relevance of coercion can be reconciled with the BIA's position in this and other cases that coercion is "irrelevant" under the persecutor bar.

The position that duress is irrelevant under the persecutor bar also conflicts with the government's interpretation of other immigration provisions. As we have discussed (see page 30, *supra*), the INS, the BIA's predecessor, recognized, in a still-extant policy, that duress excuses violation of Section 273(b) of the INA, which prohibits the bringing of undocumented aliens into the country. Immigration and Naturaliza-

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("[t]here is a gaping hole in the reasoning of the board and the immigration judge").

tion Service, General Counsel's Office, *Standard for Prosecutorial Discretion under Section 273 of the Immigration and Nationality Act*, Genco Op. No. 93-66, 1993 WL 1504013, at n.7 (1993). The Secretary of Homeland Security has also recognized the relevance of duress to application of the so-called "material support bar" (8 U.S.C. § 1182(a)(3)(B)), which prohibits the granting of asylum to individuals who give assistance to terrorists. See pages 30-31, *supra*.

If the BIA has discretion to determine whether involuntary acts are encompassed within the persecutor bar, then the BIA is obliged to offer a reasoned justification for that policy choice, including explaining it in relation to the other relevant positions that it and other government agencies have adopted. Indeed, it appears anomalous that individuals who are forced to contribute to terrorist acts, including those aimed at the United States, would be afforded more solicitude than individuals who suffer the horrific fate of being turned into human swords abroad. In the absence of any account of why this constellation of policies makes sense, the government's position is arbitrary and capricious and not entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2008

RESPONDENT'S BRIEF

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SUPREME COURT, U.S.

(12)

No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, any person who "ordered, incited, assisted, or otherwise participated in the persecution" of any person on account of "race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for asylum or withholding of removal. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The question presented is whether an alien who was admittedly involved in persecutory conduct is exempt from that rule if his conduct was the product of coercion.

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In the Supreme Court of the United States

No. 07-499

DANIEL GIRMAI NEGUSIE, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 231 Fed. Appx. 325. The decisions of the Board of Immigration Appeals (Pet. App. 4a-8a) and the immigration judge (Pet. App. 9a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2007. A petition for rehearing was denied on July 17, 2007 (Pet. App. 22a). The petition for a writ of certiorari was filed on October 15, 2007, and was granted on March 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an adult citizen of Eritrea who served as a prison guard while in the military. For four years, he stood guard at a prison where persons were tortured and killed on account of protected grounds. Invoking the longstanding "persecutor bar" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Board of Immigration Appeals (Board or BIA) held that petitioner's conduct renders him ineligible for asylum and withholding of removal. The court of appeals affirmed. It rejected petitioner's contention that the bar does not apply to him because he was following orders, relying in large part on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which rejected a similar "involuntary assistance" excuse proffered by a Nazi concentration camp guard. This Court should affirm the court of appeals' decision.

1. a. A person who is present in the United States and fears serious mistreatment on account of a protected ground if returned home may seek relief under the INA.

An alien is eligible for asylum if he demonstrates that he is a "refugee." 8 U.S.C. 1158(a), (b)(1). A "refugee" is an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Once an alien has established asylum eligibility, the decision to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1).

Withholding of removal is available if the alien demonstrates that his "life or freedom would be threatened"

in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987) (internal quotation marks omitted).

In addition, an alien who demonstrates that he would more likely than not be tortured if removed to a certain country may obtain protection under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

b. Under the INA, certain categories of aliens are ineligible for asylum and withholding of removal. As relevant here, the INA prohibits the Attorney General and the Secretary of Homeland Security from granting asylum to "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42) (second sentence) (exclusion from definition of "refugee"); see 8 U.S.C. 1158(b)(2)(A)(i) (bar to eligibility); see also 8 C.F.R. 1208.13(c)(1).

The INA similarly excludes from eligibility for withholding of removal any alien who "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(B)(i); see 8 C.F.R. 1208.16(d)(2). And the applicable regulations direct that

an applicant who engaged in that persecutory conduct may not obtain withholding of removal under the CAT, 8 C.F.R. 1208.16(d)(2), although he is still eligible for deferral of removal under the CAT, 8 C.F.R. 1208.16(c)(4), 1208.17(a).

Collectively, "[t]hese provisions are known as the 'persecutor bar,' and [they] render an applicant statutorily ineligible for either asylum or withholding of removal even if the applicant can otherwise satisfy the requirements for obtaining those forms of relief." *Gao* v. *United States Att'y Gen.*, 500 F.3d 93, 97-98 (2d Cir. 2007). If the evidence indicates that an applicant for asylum or withholding of removal participated in persecution, he bears the burden of proving that he did not. See 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1208.16(d)(2), 1240.8(d).

2. Petitioner is an adult citizen of Eritrea with dual Eritrean and Ethiopian heritage. Pet. App. 9a. In 1994, when he was 18 years old, petitioner was forcibly conscripted into military service. *Id.* at 10a; J.A. 3-5. Petitioner was discharged from the military after a short time but was recalled to service in 1998, when hostilities between Eritrea and Ethiopia escalated. Pet. App. 10a-11a. Petitioner reported for duty but "declined to go to the front and fight," so he was assigned to a naval base. *Id.* at 11a. Several months later, petitioner was arrested and taken to a prison camp "because he had initially refused to fight in the war." *Id.* at 11a-12a. During the time he was in prison camp, petitioner was punished for approximately two weeks for communicating with other prisoners who were Christians. *Ibid.*; J.A. 22-23.

After two years, petitioner was released from prison and returned to military service as a prison guard. Pet. App. 12a; Administrative Record (A.R.) 382-383; J.A. 25.

Petitioner did not receive a salary, but the military gave him "pocket money." A.R. 382-383. At the prison where petitioner was a guard, prisoners were routinely tortured or killed on account of protected grounds such as religion and nationality. Pet. App. 2a, 6a, 16a-17a.

For approximately four years, petitioner guarded the ocean, the prison gates, and the prisoners "on a rotating basis." Pet. App. 12a; J.A. 26, 33, 55. Petitioner carried a gun and was responsible for keeping control over prisoners and preventing their escape. Pet. App. 12a, 15a-16a; J.A. 59, 72-73; A.R. 373-374. His duties also included "punish[ing] the prisoners * * * by exposing them to the extreme sun heat" and denying them water, forbidding them to take showers, and keeping them from ventilation and fresh air. Pet. App. 13a; J.A. 58-59.

Petitioner routinely stood guard over prisoners who were kept in the sun as a form of punishment or execution. Pet. App. 15a-16a. Petitioner was aware that prisoners died when exposed to the sun "for more than a couple of hours," and he knew that at least one person he guarded died as a result of sun exposure. *Id.* at 13a, 16a-17a; J.A. 60-61, 73; A.R. 502.

Petitioner acknowledged his integral role in the torture and execution of prisoners, stating that he was the person responsible for "mak[ing] sure that [the prisoners] stayed out in the sun." J.A. 73; see J.A. 35, 60. Petitioner also knew that prison officials used electricity to torture prisoners while he was standing guard. Pet. App. 13a; J.A. 34-35, 61-62; A.R. 502.

Petitioner occasionally objected to and disobeyed orders to inflict punishment on prisoners. Pet. App. 13a; A.R. 330. He also "from time to time" provided prisoners with water and permitted them to take showers, and once he was reprimanded for doing so. Pet. App. 13a;

A.R. 332-334.[1] Petitioner eventually abandoned his military post and entered the United States illegally. Pet. App. 19a; A.R. 342-348.

3. Petitioner applied for asylum, withholding of removal, and protection under the CAT. A.R. 488-497, 568. He claimed that he feared persecution on the basis of his religion, because he was punished for two weeks while in prison for talking to Christians, and he feared that he would be tortured if returned to Eritrea because he had deserted the military. Pet. App. 18a-19a; J.A. 52, 68, 70-72; A.R. 492. Petitioner did not claim that he had been persecuted, or feared future persecution, on the theory that being forced to persecute others is itself persecution.

An immigration judge (IJ) denied petitioner's applications for asylum and withholding of removal. Pet. App. 9a-20a. The IJ determined that petitioner was barred from receiving asylum or withholding of removal because he had "assisted or otherwise participated in the persecution of others" as an armed prison guard. *Id.* at 15a-16a. The IJ determined that "the very fact that [petitioner] helped keep [the prisoners] in the prison compound where he had reason to know that they were persecuted constitutes assisting in the persecution of others and bars [him] from relief." *Id.* at 16a-17a (citing *Fedorenko*).

The IJ also determined, however, that petitioner was eligible for deferral of removal under the CAT because he likely would be tortured for deserting the military if he returned to Eritrea. Pet. App. 17a-20a.

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[1] The record does not support petitioner's claim (Br. 43 n.12) that his superiors "torture[d]" and "beat[]" him for refusing to follow orders; on the one or two occasions petitioner was caught disobeying orders, he was only "g[iven a] warning." J.A. 36-37.

4. The Board dismissed petitioner's appeal. Pet. App. 4a-8a. Given petitioner's role as an armed prison guard and the evidence regarding the mistreatment endured by prisoners, the Board affirmed the IJ's determination that petitioner assisted or participated in the persecution of others on account of their protected characteristics. *Id.* at 6a. Relying on its own precedent, the Board held that whether petitioner "was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial." *Id.* at 5a-6a. Comparing petitioner's conduct to that of a Nazi concentration camp guard, the Board explained that petitioner's "motivation and intent are irrelevant to the issue of whether he assisted in persecution," because it "is the objective effect of [his] actions which is controlling." *Ibid.* (internal quotation marks omitted).[2]

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-3a. Relying on this Court's decision in *Fedorenko*, the court of appeals held that "[t]he question whether [petitioner] was compelled to assist authorities is irrelevant, as is the question whether [he] shared the authorities' intentions." *Id.* at 2a. Instead, the court explained, "the inquiry should focus 'on whether [petitioner's] particular conduct can be considered assisting in the persecution'" of others. *Ibid.* (quoting *Fedorenko*, 449 U.S. at 512 n.34).

Applying that objective standard, the court of appeals held that the record evidence supported the Board's conclusion that petitioner assisted or participated in the persecution of prisoners. Pet. App. 3a. The court explained that petitioner "worked as an armed

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[2] The Board also upheld the IJ's decision to grant deferral of removal under the CAT, Pet. App. 8a, and that holding is not before this Court.

prison guard," "knew about the forms of punishment used by his superior officer," "stood guard while prisoners were kept in the sun as a form of punishment," and "depriv[ed] prisoners of access to showers and fresh air." *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

Any person who "ordered, incited, assisted, or otherwise participated in the persecution" of another on account of "race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for asylum or withholding of removal under the Immigration and Nationality Act. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). There is no exception on the face of the statute for a person who acted without malice or under duress, and the Board has reasonably determined that the statute permits no such exception.

A. The plain text of the persecutor bar establishes a categorical rule. The statute contains no state-of-mind requirement and no duress exception. Moreover, the words Congress chose—"assisted" and "participated" in "persecution"—evidence its intent that the persecutor bar be applied based on an alien's conduct, not his state of mind. Because the statute directly answers the question presented, the Court need go no further to resolve this case.

The Board has reasonably interpreted the persecutor bar to apply without regard to motivation. The Board's conclusion relies on the plain meaning of the statutory terms; the Board's longstanding construction of the key term "persecution"; the policies underlying the persecutor bar; and this Court's interpretation of a predecessor persecutor bar in *Fedorenko*. Contrary to petitioner's contentions, nothing in the plain text of the statute re-

quires that an alien act with a certain state of mind or exempts an alien who acted under coercion.

B. The many statutory predecessors to the INA's persecutor bar confirm that it applies categorically. In *Fedorenko*, this Court considered the first of those predecessors, the Displaced Persons Act of 1948, and concluded that it does not permit an exception for involuntary conduct. *Fedorenko* applies in full force to this case because the Court interpreted the same language at issue here—"assisted" in "persecuti[on]"—and rejected the precise argument petitioner now makes. Congress is presumed to have been aware of *Fedorenko* when it re-enacted the persecutor bar at issue here, and it did not include any exception for involuntary conduct. There is no basis for this Court to reach any different conclusion.

In addition to the persecutor bar at issue in *Fedorenko*, Congress enacted several other similar bars to exclude from certain immigration benefits persons who assisted in the persecution of others. Those bars were included in the 1950 amendments to the Displaced Persons Act of 1948, the Refugee Relief Act of 1953, the 1977 Act regarding Indochinese refugees, and the Holtzman Amendment to the INA. Every one of those statutory predecessors used the same key language at issue here, and none contained any exceptions based on an alien's motivation. Not surprisingly, courts have uniformly interpreted those provisions to apply to *all* aliens who assisted or participated in persecution, including those who claim their conduct was involuntary.

C. Categorical application of the persecutor bar furthers Congress's goal of extending eligibility for asylum and withholding of removal only to the most deserving applicants. Since World War II, Congress has barred

from certain immigration benefits persons who participated in the persecution of others to express its judgment that persecution in any form is unacceptable.

Barring from asylum and withholding of removal all persons who participated in persecution effectuates Congress's goal of welcoming genuine refugees consistent with the United Nations Protocol Relating to the Status of Refugees. The Protocol's exclusions contain no state-of-mind or duress exception. The INA's persecutor bar is therefore a reasonable implementation of the Protocol.

D. Although the persecutor bar is clear on its face, if any ambiguity exists, the Board's construction of the statute is controlling. The Attorney General and the Board have especially broad interpretative authority in the immigration context. Courts have deferred to, and Congress has accepted, the Board's established construction of the key term "persecution." There is no basis for concluding that the Board acted unreasonably in refusing to make an exception to a statute that, on its face, contains no exceptions.

ARGUMENT

ANY ALIEN WHO ASSISTED OR PARTICIPATED IN THE PERSECUTION OF ANOTHER ON ACCOUNT OF A PROTECTED GROUND IS INELIGIBLE FOR ASYLUM AND WITHHOLDING OF REMOVAL

A. The Attorney General Has Reasonably Interpreted The Categorical Text Of The Persecutor Bar To Apply Without Regard To An Alien's Motivation

As in any case of statutory construction, this Court's analysis "begins with the language of the statute." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). Because this

case raises questions "implicating an agency's construction of a statute which it administers," principles of *Chevron* deference control. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (internal quotation marks omitted). If Congress has "directly spoken to the precise question at issue," "that is the end of the matter," but if the statute is "silent or ambiguous with respect to the specific issue," the agency's interpretation must be upheld so long as it is "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).

As relevant here, the INA bars any person who "ordered, incited, assisted, or otherwise participated in the persecution of" any person on account of "race, religion, nationality, membership in a particular social group, or political opinion" from obtaining asylum or withholding of removal. 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The question in this case is whether there is an exception to that persecutor bar for an alien who claims that he did not act out of malice or that his conduct was coerced. The statutory text directly answers that question: there is no such exception. And if there were any ambiguity in the text, the Board's determination that the bar contains no such exception is reasonable and thus controlling.

The Board's determination did not deny petitioner all protection, however. He remained eligible for, and was granted, deferral of removal under the CAT. As construed and implemented by the Attorney General, then, the INA furnishes a calibrated set of protections and bars, but assures that persons like petitioner who assisted or participated in the persecution of others will not be removed to a country where they will suffer torture or death.

1. The language of the persecutor bar is broad and categorical. It denies eligibility for asylum and withholding of removal to "any person" who has participated in the persecution of "any person" on account of a protected ground. 8 U.S.C. 1101(a)(42); see 8 U.S.C. 1158(b)(2)(A)(i) (bars "the alien" who participates in the persecution of "any person"), 1231(b)(3)(B)(i) (bars "an alien" who participates in the persecution of "an individual"). "[T]he word 'any' has an expansive meaning," and it suggests that Congress intended no limitation on the statute's reach other than that apparent from the text. *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008).

Moreover, Congress chose comprehensive language to describe the conduct that triggers the persecutor bar, barring those persons who "ordered, incited, assisted, or otherwise participated" in persecution. Those verbs encompass a wide range of conduct, from taking a leadership role in persecution ("ordered" or "incited") to providing aid ("assisted") or otherwise furthering ("participated in") acts of persecution. The breadth of the words used thus demonstrates Congress's intent to reach *all* aliens who participated in persecuting others, regardless of their role.

The language of the persecutor bar focuses only on whether an alien engaged in certain conduct, not his state of mind. The statute does not require that the alien's conduct be "motivated by animus" (Pet. Br. 24). Nor does it require that an alien "voluntarily" assist or participate in persecution. Instead, the statute requires only that the alien have performed certain *acts*—as relevant here, assistance or participation in persecution. See *Bah* v. *Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003) ("The syntax of the statute suggests that the alien's per-

sonal motivation is not relevant."). If the alien has performed those acts, the inquiry is at an end. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 189 (1984) (strictly construing statute whose "ordinary meaning * * * does not readily admit any exception[s]" (internal quotation marks omitted)).

2. The particular words at issue here—"assisted, or otherwise participated" in "persecution"—confirm that Congress intended the persecutor bar to turn only on an alien's conduct, not his motivation.

a. The words "assist" and "participate" encompass a wide range of conduct. The plain meaning of "assist" is to give support or aid to another. See, *e.g.*, *The American Heritage Dictionary of the English Language* 80 (1976) ("[t]o give aid or support"); *Webster's New International Dictionary of the English Language* 167 (2d ed. 1958) ("[t]o give support to in some undertaking or effort"; "to help; aid"). "Participate" means "[t]o take part" in an activity. *The American Heritage Dictionary of the English Language* 955 (4th ed. 2000); see *Webster's New International Dictionary of the English Language* 1782 ("[t]o partake of"). As this Court has said, "participate" is a "term[] * * * of breadth," *Russello* v. *United States*, 464 U.S. 16, 21-22 (1983), and "participation" generally "do[es] not connote voluntariness," because the fact that a person was compelled to take part in an activity does not negate the fact that he did take part in it, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 211 (1998).

b. "Persecution" is a key term in the INA, used to define both those persons eligible for relief and those barred from it. The Attorney General, acting through the Board, has given that term "concrete meaning through a process of case-by-case adjudication,"

Aguirre-Aguirre, 526 U.S. at 425 (internal quotation marks omitted), and that interpretation is entitled to substantial deference.

The Board has consistently defined "persecution" in the context of the INA as "the infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim." *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (en banc); see, *e.g.*, *In re Maccaud*, 14 I. & N. Dec. 429, 434 (B.I.A. 1973), aff'd, 500 F.3d 355 (2d Cir. 1974). Persecution generally consists of two elements: (1) severe mistreatment of a person by the government or by a person or group the government is unwilling or unable to control (2) as a result of a certain characteristic that person possesses. *In re Acosta*, 19 I. & N. Dec. 211, 222-223 (B.I.A. 1985), overruled in part on other grounds by *Cardoza-Fonseca*, 480 U.S. at 446. The mistreatment may consist of "confinement or torture," as well as other "threat[s] to the life or freedom of" the individual. *Ibid.* The characteristics that are protected under the INA are defined by the statutory text that accompanies the word "persecution": "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42); see *Kasinga*, 21 I. & N. Dec. at 365-366.

The Board has determined that a "subjective 'punitive' or 'malignant' intent is *not* required for harm to constitute persecution." *Kasinga*, 21 I. & N. Dec. at 365. The Board made that point in the context of female genital mutilation, where it explained that that practice is "persecution" because of the "level of harm" suffered by its victim, regardless of whether the person performing that act has a "subjectively benign intent." *Id.* at 365, 367 (internal quotation marks omitted). The only in-

quiry into motivation that is appropriate in defining "persecution," according to the Board, is whether the victim was selected for mistreatment due to a certain characteristic. That inquiry is mandated by the separate textual requirement that persecution be "on account of" or "because of" a protected ground. *Id.* at 365-367. The express statutory requirement that motive be shown to that extent strongly supports the Board's conclusion that no other showing of motive is required.

The Board's longstanding interpretation of the term "persecution" comports with the common meaning of that term. Many dictionary definitions of "persecution" use the same formulation as the Board—oppression because of a belief or characteristic of the victim. See, *e.g.*, *Black's Law Dictionary* 1178 (8th ed. 2004) ("persecution" is "[v]iolent, cruel, and oppressive treatment directed toward a person or group of persons because of their race, religion, sexual orientation, politics, or other beliefs"); *The American Heritage Dictionary of the English Language* 1310 (4th ed. 2006) ("persecute" means "[t]o oppress or harass with ill-treatment, especially because of race, religion, gender, sexual orientation, or beliefs"); *Random House College Dictionary* 1074 (rev. ed. 1980) ("persecute" means "to oppress with injury or punishment, for adherence to principles or religious faith"). The word "persecution" in the INA, therefore, does not require any inquiry into a persecutor's motivation, other than that called for by the separate statutory requirement that persecution be "on account of" a protected ground.

3. Utilizing those definitions, the Attorney General has determined that whether the persecutor bar applies depends upon a two-step inquiry: (1) whether persecution on account of a protected ground occurred, and (2)

whether the particular alien's conduct, viewed objectively, rises to the level of "'order[ing], incit[ing], assist[ing], or otherwise participat[ing] in' the acts of persecution committed." *In re A-H-*, 23 I. & N. Dec. 774, 783-785 (Att'y Gen. 2005).

The first question, the Attorney General explained, should be resolved using the agency's longstanding definition of "persecution." *A-H-*, 23 I. & N. Dec. at 783-784. So long as the victim was subjected to severe mistreatment because of a listed characteristic, there was "persecution" on account of a protected ground. See *ibid.* To answer the second question, the Attorney General turned to the common meaning of the words "order," "incite," "assist," and "participate." *Ibid.* He explained that "to 'assist' means 'to give support or aid: help'" and "to 'participate' means 'to take part in something (as an enterprise or activity) usu[ally] in common with others.'" *Ibid.* (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 132, 1646 (2002)). In the Attorney General's view, those terms should "be given broad application" in line with their expansive definitions. *Id.* at 784-785.[3]

The Board has consistently held that the persecutor bar applies to any alien who took part in acts of persecution regardless of his personal motivation. "It is the objective effect of an alien's actions which is controlling," not whether the alien felt "forced" to participate in persecution or participated voluntarily. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 813-815 (B.I.A. 1988). The Board came to that conclusion after reviewing the text of the persecutor bar, which includes no

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[3] Although *A-H-* sets forth the general framework for applying the persecutor bar, no question of involuntariness was raised in that case.

state-of-mind requirement or duress exception; its long-standing definition of persecution, which focuses on conduct, rather than motivation; this Court's decision in *Fedorenko*, which interpreted a statutory predecessor to the INA's persecutor bar to require only an objective inquiry into the alien's conduct; and the policy judgment behind the persecutor bar that "those who have participated in the persecution of others are * * * not deserving of international protection" by virtue of their actions. *In re McMullen*, 19 I. & N. Dec. 90, 96-97 (B.I.A. 1984); see *Rodriguez-Majano*, 19 I. & N. Dec. at 813-815 (B.I.A. 1988).[4]

4. Under the Attorney General's two-step inquiry, it is clear that petitioner assisted or participated in persecution while a prison guard. First, there is no dispute that there was disqualifying "persecution" at the Eritrean prison where petitioner served as a guard, because prisoners were routinely tortured and executed "on account of" their protected characteristics. Pet. App. 2a, 6a.

Second, petitioner's direct and integral role in the persecution of prisoners constituted "assist[ance]" or "participation." Petitioner acknowledged that he was responsible for keeping prisoners from escaping, depriving them of water, and keeping them out in the hot sun as punishment. Pet. App. 13a, 15a-16a; J.A. 60-61, 73. In so doing, he contributed to the severe mistreatment of pris-

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[4] The Board has likewise interpreted the Holtzman Amendment, the immediate statutory predecessor to the INA's persecutor bar (see p. 35, *infra*), to apply without regard to an alien's personal motivation. See *In re Kulle*, 19 I. & N. Dec. 318, 332 (B.I.A. 1985), aff'd, 825 F.2d 1188 (7th Cir. 1987); *In re Fedorenko*, 19 I. & N. Dec. 57, 68-69 (B.I.A. 1984); *In re Laipenieks*, 18 I. & N. Dec. 433, 464 (B.I.A. 1983), rev'd on other grounds, 750 F.2d 1427 (9th Cir. 1985).

oners and advanced the goal of punishing persons on account of protected grounds. See *Miranda Alvarado* v. *Gonzales*, 449 F.3d 915, 928 (9th Cir. 2006) ("[G]uards are essential to the orderly functioning of death camps, even when they do not shoot anyone.").

Petitioner's personal motivation is not relevant to whether he assisted or participated in persecution. Although the persecutor bar requires that the victim be subject to "persecution" "on account of" or "because of" a protected ground, *e.g.*, *Rodriguez-Majano*, 19 I. & N. Dec. at 815, it does not require that *petitioner* have personally targeted them on that ground. Instead, the bar applies if petitioner "assisted" or "participated" in persecution by others that was occurring at the prison. See *Singh* v. *Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (alien not required to "share in the persecutory motive" to assist in persecution). If Congress had intended to limit the persecutor bar to those who personally selected victims on the basis of a protected characteristic, it could have drafted the statute so that the "on account of" clause modified the listed actions rather than the term "persecution," saying "any person who, because of an individual's race, religion, nationality, membership in a particular social group, or political opinion, ordered, incited, assisted, or otherwise participated in persecution." See *Bah*, 341 F.3d at 351. But Congress did not do that, presumably because such a construction would permit any participant in persecution to avoid the persecutor bar by claiming that his superiors determined what persons or groups to persecute and he was just following orders.

5. Petitioner makes essentially two textual arguments, neither of which can overcome the agency's reasonable construction of the statutory provisions.

a. First, petitioner contends (Br. 23-24) that the word "persecution" requires the actor's "state of mind [to] satisfy a standard of moral offensiveness," which he says is met when the actor is "motivated by animus toward the persecuted group." Petitioner has expressly waived a subjective intent argument, however, and he should not be permitted to resurrect it now. Before the court of appeals, petitioner repeatedly conceded that an alien's "subjective intent is not relevant to whether a person assisted in persecution." Pet. C.A. Br. 31; see *id.* at 20 ("an applicant's subjective intent alone is irrelevant"); *id.* at 40 ("the alien's subjective intent is legally irrelevant"). When the United States pointed out that concession in its brief in opposition (at 8), petitioner responded that the government "confuse[d] two analytically distinct legal concepts—duress and intent," and insisted that his argument was only about the former. Pet. Reply 1; see *id.* at 3, 5. In his brief on the merits, however, petitioner has attempted to revive his state-of-mind argument. See Pet. Br. 19, 22-24. That is too late.

In any event, petitioner's subjective intent argument is without merit. As the Board has explained, the word "persecution" does not require a showing of malice or hostility. Petitioner ignores the Board's longstanding interpretation of that word, instead citing a single dictionary definition that mentions "hostile intent." Pet. Br. 23. But that definition mentions "hostile intent" only in an alternative fourth definition, and its full text indicates that "hostile intent" refers to the fact that the oppressor selects his victim because of a certain characteristic, nothing more. See *Oxford English Dictionary Online* (visited Aug. 15, 2008) ("d. Oppression, esp. on the grounds of religious faith, political belief, race, etc.; the fact of being persecuted. Also: the action of pursuing or

persecuting a person or group with hostile intent.") <http://dictionary.oed.com>.[5] In the INA, the element of selection on the basis of a particular characteristic is covered by the separate "on account of" or "because of" language. In any event, the mere possibility of an alternative reading of "persecution" that would require a showing of hostile intent at most would make the term ambiguous, in which case the Board's definition would control.

The fact that some courts have described "persecution" as "infliction of suffering or harm upon those who differ (in race, religion, or political opinion) *in a way regarded as offensive*" does not mean that persecution requires malice. Pet. Br. 23-25 (quoting *Chaib* v. *Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005)). That formulation originated with the Board itself, which explained that "offensive" means on account of one of the protected grounds, not as a result of animus. See, *e.g.*, *In re Sanchez*, 19 I. & N. Dec. 276, 284 (B.I.A. 1985). The cases petitioner cites reflect that understanding. See *Chaib*, 397 F.3d at 1277; *Karouni* v. *Gonzales*, 399 F.3d 1163, 1170 (9th Cir. 2005).

Even if the word "persecution" required malice, that would not help petitioner, because the persecutor bar applies if he "assisted" or "participated" in persecution, and those terms do not require that he "share in the persecutory motive." *Singh*, 417 F.3d at 740. To give "participated in * * * persecution" "the same meaning as 'persecuted,'" as petitioner suggests (Br. 24), would read the broad terms "assisted" and "participated" out

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[5] The definition petitioner cites is from the online edition of the *Oxford English Dictionary*, not the second print edition published in 1989.

of the statute. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (rule against superfluities).[6]

Petitioner (Br. 25) and his *amici* (SIRL Br. 10) turn to principles of criminal culpability, such as aiding and abetting, to engraft a mental state requirement on the broad terms "assisted" and "participated." But the persecutor bar is not a criminal statute—it is a denial of immigration benefits to someone who concededly is removable—and this Court has long cautioned against equating immigration law and criminal law. See, *e.g.*, *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893); see also p. 23, *infra*. Moreover, Congress did not use the terms "aid" and "abet" in the persecutor bar; it chose the distinct terms "assist" and "participate." There is, therefore, no textual basis for interpreting the persecutor bar to require "animus" or "hostile intent."

b. Second, petitioner argues (Br. 24, 28-32) that the persecutor bar does not apply to a person who assisted or participated in persecution "involuntarily," meaning under duress,[7] "either because coerced conduct is not a legally cognizable 'act' or because duress is a defense."

Petitioner has performed a legally cognizable act. The plain meaning of the words "assist" and "participate"

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[6] Contrary to petitioner's contention (Br. 24-25), *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), supports the government's reading of the persecutor bar, because it counsels that "participate[] in persecution" "must be broader" than "persecution," or Congress's use of the broad term "participate[]" would "serve no purpose." *Id.* at 179.

[7] The term "involuntary" could also mean that an act was "not subject to control by the will," *i.e.*, that it was not volitional because it was the result of a reflex, an accident, or some other movement that the actor was unable to control. *Black's Law Dictionary* 847. Petitioner does not use the term "involuntary" in that sense; he uses the term to mean "under duress," *e.g.*, Pet. Br. 24, 40, and this brief does the same.

require only that a person take certain actions, not that he take them for any particular reason. And here, there is no question that petitioner's conduct as a prison guard was intentional, in the sense that it was volitional and that petitioner knew and understood the consequences of his actions. Pet. Reply 3 (petitioner "engag[ed] in admittedly intentional acts of persecution"); Pet. App. 2a, 16a-17a (petitioner knew the consequences of his actions). Although petitioner may have felt coerced, that does not mean that he acted unintentionally or did not perform the acts in question. See, *e.g.*, *Black's Law Dictionary* 825 ("While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial.").

Nor does the persecutor bar incorporate a duress exception. The text does not include a requirement that an alien act "voluntarily," even though several other provisions of the INA, including bars to immigration benefits, do contain that requirement. See 8 U.S.C. 1182(a)(3)(D)(ii) (barring admission of totalitarian party members unless membership was "involuntary"); 8 U.S.C. 1424(d) (barring naturalization of totalitarian party members unless membership was "involuntary"); see also, *e.g.*, 8 U.S.C. 1158(c)(2)(D) (termination of asylum if alien "voluntarily" avails himself of another country's protection); 8 U.S.C. 1481(a) (loss of citizenship if person "voluntarily" performs certain acts to renounce citizenship). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23.

The fact that some courts have presumed that a duress defense should be available for some *crimes* (Pet. Br. 29) does not justify crafting an extra-textual duress exception here. Removal "has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing." *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038-1039 (1984) (collecting examples).

When Congress has intended an alien's eligibility for an immigration benefit to turn on the application of criminal law, it has said so explicitly. See, *e.g.*, 8 U.S.C. 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii) (alien ineligible for asylum or withholding of removal if he was "convicted by a final judgment of a particularly serious crime"); 8 U.S.C. 1182(a)(2) (alien inadmissible if he committed certain listed crimes). The persecutor bar does not turn on a criminal conviction, only the performance of certain acts. That design counsels strongly against importing a criminal law defense, especially one like duress, which does not negate the underlying conduct, but simply provides an excuse that allows a person to avoid a criminal conviction. See *Dixon* v. *United States*, 548 U.S. 1, 5-7 & n.5 (2006).

There are a number of other reasons why it would be ill-advised for this Court to import a duress exception from the criminal law into the persecutor bar. First, unlike in a criminal case, the interpretation of the governing statute is for the Board in the first instance, and this Court should not lightly overturn the Board's judgment that there is no duress exception. Second, duress is not always a defense even to criminal liability; it was

not a defense to murder at common law, and many jurisdictions today do not permit duress to excuse other intentional homicides. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 9.7(a) at 74-75 (2d ed. 2003); 2 Paul H. Robinson, *Criminal Law Defenses* § 177(g) at 368 & n.58 (1984). Third, as petitioner acknowledges (Br. 38), there is no settled understanding of the elements of a duress defense. See, *e.g.*, *Dixon*, 548 U.S. at 4 n.2 ("There is no federal statute defining the elements of the duress defense," and this Court "ha[s] not specified the elements of the defense."); 2 LaFave, *supra*, § 9.7(b) at 79 ("[T]here is no uniformity in the statutory definition of [the duress] defense."). For this Court to recognize a duress excuse, it would not only have to add a limitation on the persecutor bar that does not appear on its face (and has been rejected by the Board), but it would have to undertake the significant effort of defining the contours of that limitation.[8]

None of petitioner's remaining arguments justifies crafting an extra-textual duress exception. Petitioner suggests (Br. 28) that the civil law never imposes "serious adverse consequences on the basis of involuntary acts," but there are any number of statutes that disprove that broad assertion. See, *e.g.*, *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 973 (7th Cir. 1995) (involuntary participation in an antitrust con-

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[8] For example, it would be necessary to decide how immediate and severe the threat must be; what constitutes a reasonable chance to avoid the threat; whether a threat to a third person is sufficient; and whether the action taken under duress must be proportional to the harm threatened. See Pet. Br. 38 & n.10. These would be difficult questions for Congress if it was to fashion an exception. But there is no reason for this Court to resolve them when the Board has furnished a bright-line rule that avoids them altogether.

spiracy violates the Sherman Act); *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622-624 (1st Cir. 1974) (imposing strict liability under the Refuse Act for environmental damage). None of the civil cases petitioner cites (Br. 28) applies the type of criminal law defense he wishes to engraft upon the persecutor bar.[9] And the Eleventh Circuit's erroneous recognition of a duress defense to carrier fine liability under 8 U.S.C. 1323 provides no basis for disregarding the Board's reasonable judgment that there is no duress exception here. Contrary to petitioner's suggestion (Br. 30), the INS did not determine that 8 U.S.C. 1323 contains a duress defense,[10] and the Board, the adjudicatory body responsible for rendering authoritative constructions of the Act, has held that there is no such defense. See *In re M/V "Solemn Judge,"* 18 I. & N. Dec. 186, 192-195 (B.I.A. 1982).

Petitioner likewise is not aided by the Secretary of Homeland Security's determination to make certain ex-

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[9] In *In re Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 883-884 (7th Cir. 1989), the court expressly declined to decide whether duress was a defense to civil contempt. *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71, 81 (D.D.C. 2004), concerned necessity—not duress—and the court simply determined that such a defense could not be established on the facts of that case. *Furnish* v. *Commissioner*, 262 F.2d 727, 732-734 (9th Cir. 1958), applied the contract-law principle requiring a meeting of the minds, not a criminal law duress defense.

[10] The document petitioner cites simply notes the Eleventh Circuit's decision in *Lyden* v. *Howerton*, 783 F.2d 1554, 1557 (1986), and the district court's decision in *United States* v. *Sanchez*, 520 F. Supp. 1038 (S.D. Fla. 1981), 1040, aff'd, 703 F.2d 580 (11th Cir. 1983) (Table), in a footnote, and it does so in the context of a discussion about remission of fines and standards for exercising prosecutorial discretion, not a legal defense of duress. See General Counsel's Office, INS, *Standard for Prosecutorial Discretion Under Section 273 of the Immigration and Nationality Act*, Op. 93-66, 1993 WL 1504013, at n.7 (Sept. 7, 1993).

emptions under 8 U.S.C. 1182(a)(3)(B), which bars, *inter alia*, the admission of persons who have provided material support to terrorists. See Pet. Br. 30-31. The statute expressly grants the Secretary the "sole unreviewable discretion" to decide that the bar "shall not apply" in certain circumstances, 8 U.S.C. 1182(d)(3)(B)(i), and the Secretary has invoked that authority to exempt certain persons who provided support under duress and pose no danger to the safety and security of the United States. See *Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act*, 72 Fed. Reg. 26,138-26,139 (2007).[11] The Secretary's exercise of discretion under the material support bar cannot justify making exceptions to the persecutor bar, because the latter does not grant the Secretary or the Attorney General any discretion to craft such exceptions.

Finally, petitioner argues (Br. 39) as a fallback position that even if "proof of coercion is not sufficient to

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[11] Congress has not "codified" (Pet. Br. 31 n.8) a duress exception to the material support bar. In the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 691, 121 Stat. 2364, Congress broadened the Secretary's discretionary authority to exempt certain persons from the material support bar, noted limited exceptions to that authority, and circumscribed judicial review of the Secretary's exemption determinations. *Id.* § 691(a), (b), 121 Stat. 2364-2365. It also added the requirement that the Secretary report any duress exemptions granted to Congress, along with a breakdown of the terrorist organizations that received material support, a description of the factors DHS considers when evaluating duress waivers, and "any other information that the Secretary believes that the Congress should consider while overseeing the Department's application of duress waivers." *Id.* § 691(e)(1)-(4), 121 Stat. 2365. That provision plainly manifests congressional concern about application of even an *express* grant of *discretionary* authority when invoked on the basis of perceived duress. Its enactment therefore cuts decidedly against judicial recognition of a *mandatory, implied* duress defense.

render the persecutor bar inapplicable," then coercion should be considered as a "factor" in "determining whether an individual engaged in persecution." See AHR Br. 34-36 (proposing non-exhaustive seven-factor test). But if coercion is not relevant to whether an alien assisted or participated in persecution, it is not any more appropriate to merely consider it as a "factor" than it is to make it a wholesale bar. See note 14, *infra*. The persecutor bar applies, by its terms, to specified conduct, and the Board has determined that such conduct should be judged objectively. There is no textual basis for overturning the Board's judgment.

B. The Many Statutory Predecessors To The Persecutor Bar Confirm That There Is No "Involuntariness" Exception

The conclusion that the persecutor bar applies without regard to motivation or claims of coercion is strongly supported by this Court's analysis of a predecessor persecutor bar in *Fedorenko*, as well as similar interpretations of a long line of other statutory predecessors to the persecutor bar in the INA.

1. a. The earliest statutory predecessor to the persecutor bar at issue here was in the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, a statute enacted after World War II to "enable European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas." *Fedorenko*, 449 U.S. at 495. The DPA defined those refugees as "displaced persons," and it specifically excluded persons who had, among other things, "assisted the enemy in persecuting civil[ians]." *Ibid.* (quoting Constitution of the International Refugee Organization (IRO Const.), *opened for signature* Dec. 15, 1946, Annex

I, Pt. II, § 2(a), 62 Stat. 3037, 3051, 18 U.N.T.S. 3, 20, incorporated in DPA § 2, 62 Stat. 1009).[12] In *Fedorenko*, this Court considered whether the DPA's persecutor bar precluded *all* persons who had assisted in the persecution of others from obtaining immigration benefits, including persons who claimed that they had been forced to do so. 449 U.S. at 512-513.

Fedorenko was a member of the Russian Army who was captured by German soldiers during World War II, held as a prisoner of war, and then sent to several concentration camps, where he stood guard while hundreds of thousands of innocent civilians were murdered. *Fedorenko*, 449 U.S. at 494. After the war, he obtained a visa under the DPA by lying about his wartime activities and eventually was naturalized. *Id.* at 496-497. When the government learned that Fedorenko had been a concentration camp guard, it sought to revoke his citizenship. *Id.* at 497-498.

The Court held that Fedorenko was subject to denaturalization because his citizenship had been "illegally procured." *Fedorenko*, 449 U.S. at 508-516. Central to that holding was the Court's determination that petitioner would have been barred from obtaining a visa under the DPA if he had disclosed that he was a concentration camp guard. *Id.* at 507-508. Fedorenko claimed

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[12] The DPA defined a "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." DPA § 2(b), 62 Stat. 1009. Annex I excepted from "the concern of" the IRO "[a]ny other persons" who either "assisted the enemy in persecuting civil populations of countries, Members of the United Nations," or "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations." IRO Const., Annex I, Pt. II, § 2, 62 Stat. 3051-3052, 18 U.N.T.S. 20.

that the persecutor bar in the DPA did not apply to him because he was "forced to serve as a guard" and his actions were involuntary, *id.* at 501-502, but the Court rejected that argument, finding no basis for "an 'involuntary assistance' exception in the language of" the DPA, *id.* at 512.

The Court explained that the "plain language" of the DPA's bar "mandates" that it be applied to all who assist in persecution, regardless of whether their conduct was coerced. 449 U.S. at 512. It noted that "Congress was perfectly capable of adopting a 'voluntariness' limitation where it felt one was necessary," as evidenced by Congress's adoption of a separate bar that applied to anyone who "*voluntarily* assisted the enemy forces . . . in their operations." *Ibid.* (quoting IRO Const., Annex I, Pt. II, § 2(b), 62 Stat. 3052, 18 U.N.T.S. 20, incorporated in DPA § 2(b), 62 Stat. 1009). "Under traditional principles of statutory construction, the deliberate omission of the word 'voluntary'" from the persecutor bar "compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." *Id.* at 512-513 (citing cases).

Whether a person "assisted" in "persecution," the Court concluded, depends solely on the objective question whether the person committed acts that rise to the level of assistance, not his state of mind. That is, rather than "'interpreting' the [DPA] to include a voluntariness requirement that the statute itself does not impose," courts should focus on "whether particular *conduct* can be considered assisting in the *persecution* of civilians." 449 U.S. at 512 n.34 (first emphasis added). In the Court's view, a person "who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution," while an

armed guard like Fedorenko plainly did assist in persecution. *Ibid.* The Court therefore held that, under the DPA's persecutor bar, "an individual's service as a concentration camp guard—whether voluntary or involuntary—made him ineligible for a visa." *Id.* at 512.

b. This Court's reasoning in *Fedorenko* applies with equal force to the INA's persecutor bar. The text of the persecutor bar at issue in *Fedorenko* is repeated in the persecutor bar in the INA: the DPA referred to persons who had "assisted the enemy in persecuting" civilians, DPA § 2(b), 62 Stat. 1009, incorporating IRO Const., Annex I, Pt. II, § 2(a), 62 Stat. 3051, 18 U.N.T.S. 20, while the provisions at issue here cover persons who "assisted, or otherwise participated in the persecution" of any person, 8 U.S.C. 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). Neither bar contains any requirement that a person's assistance in persecution be "voluntary." Rather, both apply broadly to "any" person who "assisted" in "persecuti[on]," without any qualifying language in the text, and the INA goes on to bar those who "ordered," "incited," and "participated" in persecution as well.

Petitioner is correct (Br. 44) that the DPA contained a separate provision applicable to persons who had "voluntarily assisted the enemy forces * * * in their operations." DPA § 2(b), 62 Stat. 1009, incorporating IRO Const., Annex I, Pt. II, § 2(b), 62 Stat. 3051, 18 U.N.T.S. 20. But that provides no reason for treating the two statutes differently. The text of the operative disqualifying provision in the DPA appears in materially identical form in the INA, and the INA likewise contains bars to immigration benefits that apply only when the alien's conduct is "voluntary." See p. 22, *supra*. Thus, in the INA, as in the DPA, Congress demonstrated that it "was perfectly

capable of adopting a 'voluntariness' limitation where it felt that one was necessary." *Fedorenko*, 449 U.S. at 512.

Moreover, although *Fedorenko* was decided after Congress first enacted the persecutor bar at issue here, Congress re-enacted the bar in 1996—after both *Fedorenko* and the Board's decisions construing the persecutor bar in a manner consistent with *Fedorenko*. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 305(a)(3), 604(a), 110 Stat. 3009-602, 3009-691. Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); see *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988).

c. Petitioner and his *amici* make several attempts to either distinguish or limit *Fedorenko*, but none is persuasive.

First, petitioner (Br. 41) and his *amici* (AJC Br. 22) contend that *Fedorenko* should not guide the decision here because that case involved the DPA, not the INA. But the persecutor bars in the DPA and the INA include the same operative language and serve the same purposes, and there is no reason why Congress would have wished the phrase "assisted in persecution" to implicitly include a voluntariness requirement in one statute but not the other. *E.g.*, *Chen* v. *United States Att'y Gen.*, 513 F.3d 1255, 1260 n.4 (11th Cir. 2008); *Xie* v. *INS*, 434 F.3d 136, 141 (2d Cir. 2006).[13]

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[13] Petitioner's observation (Br. 44-45) that any eligible person was entitled to a visa under the DPA, while asylum under the INA is discretionary, is beside the point, because the persecutor bars in both statutes do not permit any exercise of discretion. Moreover, the INA's per-

Second, petitioner (Br. 42-43) and his *amici* (AJC Br. 8-9) suggest that the DPA's persecutor bar is distinguishable from the INA's because the DPA was enacted in response to "a particular—and particularly heinous—crime against humanity," while the INA applies beyond the context of World War II. Petitioner provides no explanation for why Congress would have wished to treat modern-day persecutors who claim they were just following orders any differently from Nazis (or those who assisted them) who proffered that same excuse, and the text of the DPA and INA shows that it did not. Congress reasonably focused on persecution simpliciter. If Congress had intended to "exact retributive justice" in the DPA's persecutor bar, while "express[ing] a generous policy of admission" in the INA's persecutor bar (AJC Br. 9), it would have used different language in the two statutes.

Third, petitioner suggests (Br. 43 n.12) that the *Fedorenko* analysis does not apply because (in his view) his conduct was less egregious than Fedorenko's. There is no textual basis for such a result; if a person assisted in persecution, he is barred under both the DPA and INA. In any event, petitioner's conduct is strikingly similar to Fedorenko's: both were trained to serve as prison guards after a period of incarceration by armed forces; both stood guard as persons were tortured and killed on account of protected grounds; both were armed and charged with keeping prisoners from escaping; both received payment for their services; and both served as guards for several years. Compare *Fedorenko*, 449 U.S. at 494, 498-500 & n.12, with Pet. App. 12a-13a, 15a-16a;

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secutor bar also applies to non-discretionary withholding of removal. 8 U.S.C. 1231(b)(3)(B)(i).

J.A. 18-20, 26, 40, 42, 58-59; A.R. 328-383. Just as this Court refused to rewrite the statutory text to excuse Fedorenko, it should refuse to rewrite the INA for petitioner.

d. The federal courts of appeals have uniformly determined that *Fedorenko* informs the meaning of the INA provisions at issue here. See, *e.g.*, *Chen*, 513 F.3d at 1258 ("All fellow circuits that have addressed this issue have used *Fedorenko*'s language to establish the standard for defining whether conduct amounts to assistance in persecution."); see also *Miranda Alvarado*, 449 F.3d at 925; *Xie*, 434 F.3d at 140; *Hernandez* v. *Reno*, 258 F.3d 806, 813 (8th Cir. 2001). Applying *Fedorenko* to the INA's persecutor bar, the vast majority of courts have agreed that "assistance" in "persecution" is determined by assessing the nature of the alien's conduct, not his motivation. See *Chen*, 513 F.3d at 1260 n.4; *Xie*, 434 F.3d at 140; *Singh*, 417 F.3d at 739-740; *Bah*, 341 F.3d at 351; see also *Hajdari* v. *Gonzales*, 186 Fed. Appx. 565, 569-570 (6th Cir. 2006) (unpublished opinion).[14]

2. In addition to the persecutor bar in the DPA at issue in *Fedorenko*, Congress has included a number of persecutor bars in the immigration laws prior to enacting the bar at issue here. *Every one* of those predecessor persecutor bars used the same categorical language. *None* of them has been interpreted to permit an excep-

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[14] In *Hernandez*, 258 F.3d at 812-814, the Eighth Circuit interpreted *Fedorenko* to permit consideration of an alien's motivation as a factor in determining whether the alien's "particular conduct can be considered assisting in the *persecution* of civilians." *Fedorenko*, 449 U.S. at 514 n.34. That was error. The *Fedorenko* Court unequivocally rejected the argument that voluntariness is relevant to whether an alien assisted in persecution. *Id.* at 512-513 & nn.34-35 (statutory text "leave[s] no room for doubt" on that point).

tion based on the alien's state of mind or claims of coercion. That long statutory history confirms the reasonableness of the Board's decision not to recognize any exceptions to the INA's persecutor bar.

In 1950, Congress added a second persecutor bar to the Displaced Persons Act that used broader language than the bar in the 1948 Act. See Ch. 262, § 13, 64 Stat. 227. That bar provided: "No visa shall be issued * * * to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin." *Ibid.* Just as this Court did with respect to the persecutor bar at issue in *Fedorenko*, courts have refused to recognize a duress exception to that categorical text. See *United States* v. *Reimer*, 356 F.3d 456, 459-460 (2d Cir. 2004); *United States* v. *Koreh*, 59 F.3d 431, 439 (3d Cir. 1995); *United States* v. *Breyer*, 41 F.3d 884, 889-890 (3d Cir. 1994).

The Refugee Relief Act of 1953 (RRA), a successor to the DPA passed in 1953 to provide admission for certain refugees from Communist countries, similarly barred from visa eligibility "any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Ch. 336, § 14(a), 67 Stat. 406. The RRA's persecutor bar, like those in the DPA, has been long understood not to include any involuntariness exception or state-of-mind requirement. See *United States* v. *Hansl*, 439 F.3d 850, 854 (8th Cir.), cert. denied, 127 S. Ct. 318 (2006); *United States* v. *Kumpf*, 438 F.3d 785, 790-791 (7th Cir. 2006); *United States* v. *Friedrich*, 402 F.3d 842, 844-845 (8th Cir. 2005).

In 1977, Congress passed a law to authorize adjustment of status of certain persons from Vietnam, Laos, and Cambodia that excepted "[a]ny alien who ordered,

assisted, or otherwise participated in the persecution of any person because of race, religion, or political opinion." Act of Oct. 28, 1977, Pub. L. No. 95-145, § 105, 91 Stat. 1224. As the text suggests, that provision was modeled on Congress's previous "experience with * * * Nazi war criminals" in the DPA and RRA. *Indochinese Refugees—Adjustment of Status: Hearings on H.R. 2051 Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 46 (1977) (statement of Rep. Crosland). Although there do not appear to be any reported court of appeals cases interpreting that language, there is no textual basis for believing it would be interpreted any differently from its predecessors.

In 1978, Congress passed the Holtzman Amendment, which amended the INA to authorize exclusion and removal of any alien associated with Nazi forces who "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Pub. L. No. 95-549, § 103(a)(3), 92 Stat. 2066 (8 U.S.C. 1182(a)(3)(E) and 1227(a)(4)(D)). That provision was modeled on the DPA and RRA, see, *e.g.*, H.R. Rep. No. 1452, 95th Cong., 2d Sess. 3, 5 (1978), and it has consistently been applied based solely on an alien's conduct, without regard to his motivation. See *Naujalis* v. *INS*, 240 F.3d 642, 646 (7th Cir. 2001); *Maikovskis* v. *INS*, 773 F.2d 435, 445-446 (2d Cir. 1985).

Combined with this Court's decision in *Fedorenko*, the decisions construing the other statutory predecessors to the INA's persecutor bar make clear that it contains no exception for involuntary conduct.

C. The Board's Interpretation Of The Persecutor Bar Is Consistent With The Bar's Statutory History And Purposes

When construing the INA, this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *Cardoza-Fonseca*, 480 U.S. at 431 (internal quotation marks and citations omitted). In this case, Congress expressed through categorical language its policy judgment that *any* persons who participate in the persecution of others should be denied certain immigration benefits. That policy judgment is fully consistent with the United States's international obligations regarding refugees.

1. It is well-settled that Congress has plenary authority over immigration matters. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972). That authority includes both the power to welcome refugees to the United States and to refuse admission to those persons "whose presence in the country [Congress] deems hurtful." *Bugajewitz* v. *Adams*, 228 U.S. 585, 592 (1913). Since World War II, Congress has invoked that broad authority to deny certain immigration benefits to aliens who come to the United States after assisting or participating in the persecution of others. See pp. 27-28, 34-35, *supra*.

Those bars reflect Congress's longstanding policy judgment that persecution—whether by Nazis or by modern-day persecutors—is "conduct [that] is deemed so repugnant to civilized society and the community of nations that its justification will not be heard." *McMullen*, 19 I. & N. Dec. at 97. Central to that judgment is Congress's refusal to excuse the conduct of those who admitted participating in horrific acts of persecution but claimed that they were just following orders. See, *e.g.*,

124 Cong. Rec. 31,647 (1978) (statement of Rep. Holtzman) (excluding Nazi persecutors from the United States "mak[es] it clear that persecution in any form is repugnant to democracy and our way of life").

Congress enacted the INA's persecutor bar against the backdrop of that long statutory history of excluding those who participate in persecution. As with previous persecutor bars, Congress again chose categorical language that denies immigration benefits to *any* person who participated in persecution. See Refugee Act of 1980, Pub. L. No. 96-212, §§ 201(a), 203(e), 94 Stat. 102-103, 107. That choice was informed primarily by "the two special statutory enactments under which refugees were admitted to this country after World War II, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953," H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979), which contained persecutor bars premised on the view that *all* persons who have participated in the persecution of others should be denied the privilege of admission into the United States. See, *e.g.*, *Amending the Displaced Persons Act of 1948: Hearings on H.R. 1344 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 132 (1949) (statement of Rep. Javits) (stating the intent "to keep out those aliens * * * who were *in any way* participants in gen[o]cide or in these acts of racial or religious persecution" (emphasis added)).

An alien's continued presence in the United States is "a matter of permission and tolerance," not of right. *Harisiades*, 342 U.S. at 586-587. Having decided to offer refuge to *victims* of persecution from other nations, Congress reasonably chose not to extend that very same privilege to persons involved in their persecution.

2. Petitioner contends (Br. 25) that Congress would not have wanted to deny immigration benefits to a person who participated in the persecution of others under duress because such a person's conduct is not "morally offensive." But Congress focused the persecutor bar on a person's *conduct*, not his state of mind, on the judgment that persons who engage in persecutory conduct are *per se* undeserving of certain immigration benefits. The fact that a person may have acted under duress does not make the suffering of his victims any less horrific. It is therefore understandable that Congress would make a categorical determination to firmly dissociate this Nation from *all* those who participated in persecution of others based on race, religion, and other protected grounds, without attempting to make (or requiring the Attorney General to make) judgments about the relative moral culpability of persons within that class. Such categorical judgments can be critical to assuring the citizens of this Nation and of other Nations that the United States will not tolerate, and will not undertake to welcome and embrace, any persons who have been involved in the very sorts of persecution the United States is committed to eradicating.

Moreover, the difficulty of defining what constitutes a "morally offensive" state of mind (Pet. Br. 24) underscores why Congress chose to focus on a person's conduct. Congress no doubt wanted to prevent each decisionmaker from undertaking a free-form inquiry using her own "scale of moral offensiveness" based on "state of mind" and any other facts she deems "relevant." *Id.* at 23; see *id.* at 25, 26, 27. Congress thereby avoided the pitfalls of an *ad hoc* moral relativism and a *post hoc* assessment of the facts and circumstances of asserted coercion of those who concededly participated in persecution

in foreign countries. Indeed, the legislative record reveals Congress's intention that the persecutor bars be easily administrable. See, *e.g.*, H.R. Rep. No. 1452, *supra*, at 7-8 (noting intent that the Holtzman Amendment "be properly and efficiently administered," and relying on assurances that "consular and immigration officers" will "set[] forth specific and clearly identifiable standards").[15]

Petitioner and his *amici* suggest that Congress could not have intended categorical application of the persecutor bar because that could lead to seemingly unfair outcomes in certain cases. For example, petitioner contends (Br. 26-28) that Congress could not have intended to bar persons who participated in persecution under duress because "forcing individuals to engage in persecutory acts is itself persecution." That is not the basis for petitioner's claim of persecution; he claimed he was persecuted on the basis of his religion before he became a prison guard. Pet. Br. 14. In any event, petitioner is

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[15] Another reason that this Court should be particularly reluctant to adopt a construction of the word "persecution" that requires an inquiry into subjective motivation or asserted coercion is that that construction presumably would have to be applied to affirmative claims for asylum and withholding of removal as well as in the context of the persecutor bar. See, *e.g.*, *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (same statutory text should be given same meaning in different contexts); see also SIRL Br. 7-8. As a result, an applicant for asylum or withholding could be required to show not only that he was subjected to severe mistreatment on account of a protected ground, but also that his oppressor acted voluntarily and with a certain subjective intent towards him in particular. That additional burden would likely be significant, see, *e.g.*, *Bolanos-Hernandez* v. *INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) ("Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution."), and it would complicate immigration proceedings, contrary to Congress's intent.

mistaken. For example, a soldier who is directed to torture a political prisoner is not being "persecuted" "on account of" *his own* protected characteristic, which is what the INA requires. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992).[16] Indeed, none of the cases petitioner cites (Br. 27-28) supports the sweeping proposition that forcing a person to engage in persecution automatically constitutes persecution under the INA.[17] Moreover, there is nothing inherently inconsistent in concluding that an alien is both the victim of past persecution and subject to the persecutor bar: the INA contemplates precisely that result. See *McMullen*, 19 I. & N. Dec. at 97. In any event, persons barred from eligibility for asylum and withholding of removal still may obtain deferral of removal under the CAT, which petitioner obtained in this case.[18]

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[16] An act of self-defense similarly does not constitute persecution because it is not "on account of" the victim's protected ground. See *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004).

[17] Rather, those cases stand for the limited proposition that, although forced conscription generally is not persecution, punishment of a military deserter may be persecution if the alien is punished for refusing to participate in military action and the punishment is based on a protected ground. See *Islami* v. *Gonzales*, 412 F.3d 391, 393, 396-397 (2d Cir. 2005), overruled on other grounds by *Shi Liang Lin* v. *United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), cert. denied, 128 S. Ct. 2472 (2008); *Vujisic* v. *INS*, 224 F.3d 578, 579, 580, 582 (7th Cir. 2000); *Ramos-Vasquez* v. *INS*, 57 F.3d 857, 860 (9th Cir. 1995).

[18] Petitioner (Br. 9-11) and his *amici* (HRF Br. 18-28) suggest that Congress would not have intended to apply the persecutor bar to children who are forcibly conscripted. This case does not raise that issue—petitioner was 24 or 25 years old when he first became a prison guard, J.A. 3-5, 25—and the difficult task of determining whether and where to make exceptions for children should be entrusted to Congress, especially because Congress has already undertaken that task in other

Contrary to petitioner's suggestion (Br. 34-35, 37-38), his view of the persecutor bar cannot be defended on the ground that Congress simply intended to permit the Attorney General to "exercise discretion to adapt the country's asylum policy to the myriad different factual circumstances that asylum-seekers can present." As discussed above, the exclusions are written in categorical, not discretionary, terms. In addition, while *asylum* could still be denied as a matter of discretion if the persecutor bar were inapplicable, *withholding of removal* would be mandatory. And in any event, there is nothing in the legislative record of the Refugee Act to suggest that Congress envisioned *any* exceptions to the persecutor bar, much less the *ad hoc* regime suggested by petitioner.

Petitioner hypothesizes (Br. 35) that the INA's persecutor bar was modeled solely on the bar in the 1977 Act regarding Indochinese refugees, which (in his view) Congress intended to be "flexible." But that is sheer speculation, belied by the text of that Act. See pp. 34-35, *supra*. Further, this Court has cautioned that when Congress has enacted provisions "specifically to restrict the opportunity for discretionary administrative action" under the INA, as it did here, courts should be particularly careful not to "construe the [INA] to broaden the Attorney General's discretion," because to do so "would shift [the] authority" to define the limits on immigration benefits "from Congress to [the] INS and, eventually * * * to the courts." *Phinpathya*, 464 U.S. at 195. Because "Congress designs the immigration laws, * * * it is up

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provisions of the INA. See, *e.g.*, 8 U.S.C. 1182(a)(3)(D)(ii), 1424(d), 1481(a)(2).

to Congress to temper the laws' rigidity if it so desires." *Id.* at 196.

3. a. Congress's decision to bar from asylum and withholding of removal all persons who have participated in the persecution of others is consistent with its goal of offering safe haven to genuine refugees—to victims, not perpetrators, of persecution. Congress enacted the persecutor bar at issue here as part of the Refugee Act of 1980, which was intended to establish "a comprehensive United States refugee resettlement and assistance policy." S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979). In order to determine which persons should be admitted into the United States or allowed to remain as refugees, Congress looked to the Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. See *Cardoza-Fonseca*, 480 U.S. at 436-437.

The Protocol is an international agreement designed to guarantee certain protections to refugees. It incorporates the substantive portions of a previous international agreement—the 1951 Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954)—but removes from the definition of "refugee" time and place restrictions that were present in the earlier Convention. See Protocol art. I(1) and (2), 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268 (incorporating Convention arts. 2-34). The United States acceded to the Protocol in 1968, after determining that it "was largely consistent with existing law." *INS* v. *Stevic*, 467 U.S. 407, 417-418 (1984) (collecting legislative history).[19]

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[19] The United States was not a signatory to the Convention. *Stevic*, 467 U.S. at 416 n.9.

The Convention defines a "refugee" as any person who, "owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group or political opinion," is outside his home country and "unable" or "unwilling" to return. Convention art. 1(A)(2), 189 U.N.T.S. 152. It then excludes several categories of persons from its protections. Article 1(F) states that the Convention's protections "shall not apply to any person with respect to whom there are serious reasons for considering that":

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

189 U.N.T.S. 156. That provision was adopted to exempt those who, as a result of their conduct, were undeserving of the Convention's protections. See, *e.g.*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-fourth Meeting, Nov. 27, 1951, *Conference of the Draft Convention on the Status of Refugees* (statement of Mr. Von Trutzschler, Federal Republic of Germany) <http://www.unhcr.org/protect/PROTECTION/3ae68cde18.html>.

b. Congress has wide latitude in implementing its obligations under the Protocol. The Protocol is not a self-executing treaty, *Stevic*, 467 U.S. at 428 n.22, and it

thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation, see, *e.g.*, *Al-Fara* v. *Gonzales*, 404 F.3d 733, 743 (3d Cir. 2005) (collecting cases). The specific measures each contracting state takes to implement the Protocol "are matters very much in the realm of sovereign discretion" Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 528 (3d ed. 2007); see James C. Hathaway, *The Law of Refugee Status* 214-215 (1991) ("[E]ach contracting state [is] to decide for itself when a refugee claimant is within the scope of an exclusion clause.").[20]

In the Refugee Act, Congress largely adopted the Convention's definition of "refugee," after determining "that the new definition does not create a new and expanded means of entry, but instead regularizes and formalizes the policies and practices that have been followed in recent years." *Stevic*, 467 U.S. at 426 (quoting H.R. Rep. No. 608, *supra*, at 10); see Refugee Act §§ 201(a), 203(e), 94 Stat. 102-103, 107. Congress then added the persecutor bar at issue here, finding it "consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity')." H.R. Rep. No. 608, *supra*, at 10.

The Convention, like the INA, excludes "any person" who engages in disqualifying conduct, without exception. Convention art. 1(F), 189 U.N.T.S. 156. The Conven-

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[20] The fact that courts in four of the nearly 150 states that are parties to the Convention—in decisions rendered long after adoption of the Protocol and enactment of the INA's persecutor bar—have permitted a duress exception to their persecutor bars (SIRL Br. 25-28; UNHCR Br. 15-17) does not compel the United States to recognize such an exception, much less warrant imposition of an exception that Congress itself has not adopted.

tion's exclusions (like the INA's persecutor bar) do not express any requirement that the person act "voluntarily," despite the fact that the Convention (like the INA) contains other provisions that apply *only* to voluntary conduct. See, *e.g.*, Convention art. 1(C)(1), (2), (4), 189 U.N.T.S. 154 (stating that the Convention's protections "shall cease to apply to" persons who take certain voluntary actions).

Petitioner is mistaken in contending (Br. 33; see SIRL Br. 22-23) that a duress exception is implicit in the Convention's references to "crimes" in certain of the exclusion clauses in Article 1(F). Those provisions do not condition exclusion on an actual finding of criminal responsibility; rather, they provide for exclusion if there are "serious reasons for considering" that the person has committed one of the crimes in question. Convention art. 1(F), 189 U.N.T.S. 156. That is significant, because while there may be circumstances in which person would be excused from criminal responsibility by a duress defense in some circumstances in an actual prosecution, the possibility that such a defense might be raised does not mean that there are not at least "serious reasons for considering" that he committed the crime. Moreover, the wide variations in how different nations define and apply duress defenses in their criminal laws make it particularly unlikely that the parties, in adopting the categorical text of Article 1(F), intended that the Convention itself would implicitly require such a defense. See, *e.g.*, *Prosecutor* v. *Erdemovic*, Case No. IT-96-22-A, 1997 WL 33341547, Judgment, ¶¶ 59-61 (App. Chambers Oct. 7, 1997) (Former Yugo.) (McDonald & Vohrah, JJ.) (surveying different nations' duress defenses); *id.* ¶ 67 ("The rules of the various legal systems of the world are * * * largely inconsistent regarding the specific question

whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons.").[21]

c. Petitioner also relies (Br. 33-34) on the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (1979) (*Handbook*) for the proposition that parties to the Protocol (and thus Congress) intended to permit a duress exception to the persecutor bar. The *Handbook*, which was issued eleven years after the United States acceded to the Protocol, "is not binding on the Attorney General, the BIA, or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427. Indeed, it disclaims any force of law. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (citing *Handbook* para. (ii) at 1). Further, there is no evidence in the legislative history of the Refugee Act that Congress in 1980 looked to the *Handbook* to discern the meaning of the Convention. And even if the *Handbook* offered some useful guidance on the meaning of Article 1(F), it of course cannot trump Congress's decision not to include a duress exception in the persecutor bar or the Attorney General's reasonable construction of the bar as not permitting such an exception. *Aguirre-Aguirre*, 526 U.S. at 424-428.

In any event, the *Handbook* does not purport to answer the question presented here. Petitioner points (Br. 33) to paragraph 162, which says that "the acts covered by" Article 1(F)(c) are "assumed" to be "of a criminal nature." See AJC Br. 8 (referring to *Handbook* paras.

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[21] Indeed, the drafters of the Convention considered and rejected a proposal to permit countries to make exceptions to this exclusion; "[m]ost representatives * * * were strongly of the view that discretion of this kind could undermine the integrity of refugee status." Hathaway, *supra*, at 215-216.

147-150). But that statement simply characterizes the relevant conduct as "criminal"; it says nothing about the availability of a duress exception.[22] Likewise, neither the *Handbook*'s statement that contracting states should consider "all the relevant factors" in applying the Article 1(F)(b) exclusion (para. 157), nor its general suggestion that states apply the "exclusion clauses * * * in a restrictive manner" (para. 180), says anything about the availability of a duress exception under Article 1(F).[23]

In implementing the Protocol, therefore, Congress acted well within its discretion and consistent with its goal of extending immigration benefits to victims, rather than perpetrators, of persecution.

D. Any Statutory Ambiguity Must Be Resolved By Deferring To The Attorney General's Interpretation

1. It is well-established that the Attorney General's interpretation of the INA is entitled to substantial deference. The INA grants the Attorney General broad discretion with respect to the "administration and enforcement" of the immigration laws and states that his "determination[s] and ruling[s] * * * with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a)(1); see *Aguirre-Aguirre*, 526 U.S. at 424. The

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[22] Paragraph 162 of the *Handbook* does not, as petitioner indicates (Br. 33), mention "instigators and accomplices."

[23] The U.N. Commissioner's 2003 Guidelines (Pet. Br. 34 n.3; see UNHCR Br. 12-19) cannot shed light on Congress's intent in enacting the INA's persecutor bar more than two decades earlier. And the Commissioner's suggestion that contracting states "consider[]" factors like "duress," U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1(F) of the 1951 Convention Relating to the Status of Refugees*, 15 Int'l J. of Refugee L. 492, 498 (2003), cannot trump Congress's decision not to include a duress exception.

Attorney General has vested that interpretive authority in the Board, 8 C.F.R. 1003.1(d)(1), and consequently the Board is "accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning" in individual cases." *Aguirre-Aguirre*, 526 U.S. at 425 (internal quotation marks omitted). Indeed, the Court in *Aguirre-Aguirre* invoked *Chevron* deference in the precise context of construing one of the bars to asylum and withholding of removal in the INA.

Judicial deference to agency statutory interpretations is particularly appropriate in the immigration context, because Executive Branch officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988). Here, a decision by the Executive Branch to grant protection to persons who have participated in persecuting others in their home country could well "affect our relations with that country or its neighbors." *Aguirre-Aguirre*, 526 U.S. at 425. The Court, therefore, should be particularly reluctant to second-guess the Executive's considered interpretation of the persecutor bar.

The Board's conclusion that the categorical language of the persecutor bar should be applied categorically is plainly reasonable and thus is entitled to deference. It is based in large part on the Board's longstanding definition of the important statutory term "persecution," a definition to which the courts of appeals have routinely deferred. See, *e.g.*, *Fisher* v. *INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc). Not only has Congress left a gap for the Attorney General to fill on the definition of that term, but it has approved how the agency has exercised that authority. In enacting the Holtzman Amendment, the immediate statutory predecessor to the persecutor bar at issue here, Congress declined to add an explicit

definition of "persecution" to the INA in light of the Board's "substantial body of preceden[t]" and "the success achieved in administering" the INA "without the benefit of an express definition." H.R. Rep. No. 1452, *supra*, at 6.

Moreover, Congress re-enacted the persecutor bar to asylum and withholding in 1996, well after this Court's decision in *Fedorenko* and the Board's decisions construing the persecutor bar in a manner consistent with *Fedorenko*. See IIRIRA §§ 305(a)(3), 604(a), 110 Stat. 3009-602, 3009-691.[24] Congress may thus be taken to have ratified not only this Court's interpretation of the virtually identical language in *Fedorenko*, but also the manner in which the Attorney General has exercised his authority to interpret the persecutor bar in the INA itself.

Petitioner's arguments for denying deference to the Attorney General's interpretation are unpersuasive. First, petitioner is seriously mistaken in contending (Br. 46) that the statutory text unambiguously requires that an exception be made for him. As explained above, the text contains no exceptions, and the Court construed parallel language in *Fedorenko* not to include such an exception.

Second, petitioner is mistaken in suggesting (Br. 46-47) that no deference is due because the Board's decisions rely in part on *Fedorenko*. The Board can hardly be faulted for turning to *Fedorenko* for guidance—the Court interpreted the same key language in a similar statutory context, and the courts of appeals have uniformly determined that it informs the meaning of the

[24] Congress also added a persecutor bar using the same language for applicants for legalization in 1986. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3395.

INA's persecutor bar. See pp. 30-33, *supra*. In any event, the Board's construction of the persecutor bar is based not only on *Fedorenko* but also on its longstanding definition of persecution and the policies underlying the persecutor bar. See pp. 14-17, *supra*.

Third, the Attorney General has not taken inconsistent positions on the meaning of the persecutor bar. See Pet. Br. 48-50. The fact that the Secretary of Homeland Security (not the Attorney General) has permitted limited exceptions to a *different* bar to immigration benefits, when he has been granted express statutory discretion to do so, supports rather than undermines the Attorney General's refusal to recognize a mandatory exception to the persecutor bar that the text does not permit. See pp. 25-26, *supra*. And the Attorney General has not recognized a duress defense exception in the context of carrier liability in 8 U.S.C. 1323. See p. 25, *supra*.

Finally, contrary to petitioner's contention (Br. 49), the Attorney General did not "endorse" the Eighth Circuit's view of the persecutor bar in *A-H-*. Read in context, the citation merely stands for the unremarkable proposition that courts should review the totality of the alien's "relevant conduct" in determining whether the conduct qualifies as ordering, inciting, assisting, or participating in persecution. 23 I. & N. Dec. at 785. No question of duress was presented in *A-H-*. There is therefore no basis for concluding that the Attorney General intended to recognize a duress exception to the persecutor bar, especially since to do so would have been contrary to the Board's longstanding precedent.

2. Nor may the Attorney General's reasonable construction of the statute be disregarded on the ground that ambiguities should be resolved in favor of the alien. If courts were required to resort to such a proposition

any time a provision of the INA is ambiguous, that would wholly usurp the Attorney General's expressly conferred authority to resolve statutory ambiguities in the first instance and this Court's holding in *Aguirre-Aguirre* that his interpretations of the INA are entitled to *Chevron* deference. See 526 U.S. at 424-425. Rather, a court could properly consider whether any remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal, which of course includes the requirement of *Chevron* deference. *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007); *Amador-Palomares* v. *Ashcroft*, 382 F.3d 864, 868 (8th Cir. 2004).[25]

For petitioner to prevail here, then, he is required to demonstrate that the Board acted unreasonably in declining to adopt an exception that does not appear on the face of the persecutor bar, contravenes a decision of this

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[25] In *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1975), the Court resolved an ambiguity in favor of the alien, observing that forfeiture of his residence for acts committed after his admission was a "penalty." See *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964). Petitioner is not lawfully in this country, much less a permanent resident alien, and the conduct at issue occurred abroad. Moreover, the view that removal is a "penalty" is in significant tension with this Court's repeated acknowledgment that "[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry." *Lopez-Mendoza*, 468 U.S. at 1038; see p. 23, *supra*. And unlike the rule of lenity under the criminal law, where *Chevron* deference does not apply, a judicially fashioned rule of construing immigration statutes in favor of the alien, where the Attorney General has rendered a different interpretation, would be inconsistent with the separation of powers and the paramount role of the political Branches in immigration matters, and it cannot be justified by constitutional concerns in the criminal context regarding fair notice and retroactive application. See *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).

Court interpreting the same key language, and ignores Congress's re-enactment of the persecutor bar after it had been authoritatively construed. That he cannot do, for when a "restriction[] cannot be discerned in the text" of the INA, "the Attorney General and BIA are not bound to impose the restriction[] on themselves." *Aguirre-Aguirre*, 526 U.S. at 430. The courts are not free to disregard the Attorney General's reasonable interpretation of the statute and impose an exception at odds with the will of Congress. "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *United States* v. *Rutherford*, 442 U.S. 544, 559 (1979).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2008

APPENDIX

1. 8 U.S.C. 1101 provides, in pertinent part:

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coer-

cive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * * * *

2. 8 U.S.C. 1158 provides, in pertinent part:

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

* * * * *

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a

refugee within the meaning of section 1101(a)(42)(A) of this title.

* * * * *

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

* * * * *

3. 8 U.S.C. 1231 provides, in pertinent part:

Detention and removal of aliens ordered removed

* * * * *

(b) Countries to which aliens may be removed

* * * * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

* * * * *

4. 8 C.F.R. 1208.13 provides, in pertinent part:

Establishing asylum eligibility.

* * * * *

(c) *Mandatory denials*—(1) *Applications filed on or after April 1, 1997.* For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

* * * * *

5. 8 C.F.R. 1208.16 provides, in pertinent part:

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

* * * * *

(d) *Approval or denial of application*—

* * * * *

(2) *Mandatory denials.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the Applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

* * * * *

REPLY BRIEF

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(13)

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The statutory provisions at issue in this case exclude from the category of "refugee[s]" eligible to seek asylum any person who engages in "persecution" on account of race, religion, nationality, or other prohibited category. 8 U.S.C. § 1101(a)(42)(B); see also *id.* §§ 1158(b) & 1231(b)(3). The government's contention that this exclusion applies even when the individual was forced to engage in the alleged persecutory conduct under threat of death or severe injury turns the statutory language on its head, denying refugee status to individuals routinely described in common parlance as *victims* of persecution rather than as persecutors:

- Romanian Christians, forced by the Communist Party to torture others as part of their "unmasking" to "insure[] that the spirit would be utterly broken, and that distrust and misery would make cooperation in an uprising much less likely. (Becket Am. Br. 9);
- Individuals tortured because of their political beliefs and forced to identify others with the same views, who are then arrested and tortured on the basis of that information (Human Rights First *et al.* ("HRF") Am. Br. 29-35);
- Family members forced by threats of death to engage in incest as a method of torturing minority populations (Pet. Br. 27);
- Children captured and tortured for political statements or their racial or ethnic group *and* then coerced by threats of death, torture, and severe injury to join armies and attack

civilian populations (HRF Am. Br. 11-15 & 24-26).[1]

These individuals were forced to engage in persecutory acts as part of the persecution directed against them. The plain meaning of the statutory language provides no basis for labeling their coerced actions as "persecution," excluding them from the statutory term "refugee[s]," and thereby depriving them of the opportunity to invoke the protection of asylum, a protection that was designed to provide sanctuary from the very sort of persecution that they themselves have suffered.

The government never explains why it urges an interpretation of the statute so inconsistent with the words' ordinary meaning. It recognizes (U.S. Br. 31 & n.13) that the issue here involves only eligibility to seek asylum, and that the Attorney General retains substantial discretion to deny asylum to eligible persons—including persons coerced to engage in persecution. It notes (Br. 41) that rejecting its view of the statute would expand the class of persons eligible for withholding of deportation, but does not dispute our explanation (Pet. Br. 37-38) that other protections for persons seeking asylum vitiate the practical significance of that effect.

Although the government expresses concern about "the pitfalls of an *ad hoc* moral relativism and a *post hoc* assessment of the facts and circumstances of asserted coercion" (Br. 38), the persecution inquiry

---

[1] The government states (Br. 40 n.18) that this case does not raise the issue of application of the persecutor bar to minors, but—by stating that the issue is one for Congress—the government makes clear its view that the "categorical" exclusion of coercion would apply to children's asylum applications as well.

is already extremely fact-intensive, requiring the assessment of the circumstances of past events and the reasons why they occurred as well as the credibility and knowledge of the applicant. That inquiry takes place in every case in which an individual seeks asylum on persecution grounds. Considering a claim of coercion will neither expand the focus of the inquiry (because the claim of coercion typically is tied to the persecution suffered by the applicant) nor add a determination different in kind from those that immigration judges already must make.

Finally, the government tries (Br. 38) to attribute to Congress "a categorical determination" to disassociate the Nation from persecution. But the government's construction of the statute would categorically exclude from eligibility for asylum persons subject to the very sort of religious and other persecution that led to the founding of the Nation. If Congress's goal was to "offer[] safe haven to genuine refugees" (U.S. Br. 42) it is inconceivable that it would have barred these individuals from seeking to remain here.

Not surprisingly given this background, all of the relevant tools of statutory interpretation demonstrate that the persecutor clause does not exclude from eligibility for asylum persons who are forced under threat of death or serious injury to engage in persecution.

A. The Persecutor Bar Does Not Encompass Acts Coerced By Threats of Death Or Severe Harm.

The government devotes substantial portions of its brief to arguing that an individual's subjective intent is not relevant to determining whether he has

engaged in persecution within the meaning of the INA. See U.S. Br. 14, 16, 19-21 & 22. That issue is not before the Court. See Pet. Rep. Br. 2-5.

Petitioner's claim is that conduct coerced by threats of death or severe harm does not qualify as "persecution." See *Dixon* v. *United States*, 548 U.S. 1, 7 (2006) (explaining difference between two issues).

The statute's plain language, the relevant background principles of statutory construction, and the context in which Congress acted make clear that conduct coerced by threats of death or severe injury does not trigger the persecutor bar.

1. The plain language excludes coerced acts.

Although the government devotes considerable attention to explaining why the term "persecution" does not require proof of a particular subjective motivation (*e.g.*, Br. 16-17, 18 & 19-21), the sum total of its argument relevant to the issue presented here—whether the plain meaning of the words Congress used encompasses coerced conduct—appears in a single paragraph on pages 21-22 of its brief.

Significantly, the government does not dispute our explanation (Pet. Br. 23-24) that the word "persecution" carries an element of moral blameworthiness. Indeed, the definitions cited by the government (Br. 15) confirm that conclusion, utilizing terms such as "oppress" and "harass" and specifying that the acts must occur "because of" the race, religion, or other protected characteristic of the individuals persecuted. Thus, if the statute excluded from asylum eligibility "any person who persecuted any person on account of" a protected characteristic, it plainly would not reach coerced acts: a coerced individual

engages in the conduct because of the coercion, not because of the persecuted individual's characteristics.

The government's argument thus rests entirely on its assertion that the inclusion of the words "assist[]" and "participate[]" expands the scope of the provision to include acts coerced by threats of death or severe injury. That contention is wrong.

First, the government denigrates the degree of coercion to which petitioner and similarly situated individuals are subjected. Thus it asserts that petitioner's acts were "volitional" and that petitioner "may have felt coerced" (Br. 22), and repeatedly, and erroneously, states that petitioner argues he was subject to coercion solely because he was "following orders" (*e.g.*, Br. 2, 6 n.1, 18, 32 & 36).

Petitioner was beaten and otherwise mistreated when he violated the rules while imprisoned in Eritrea. J.A. 22-24. He would have been executed if he had tried to stop serving as a prison guard, which is what happened to two of his friends who tried to escape from their forced guard service. *Id.* at 38-40 & 41-42. Indeed, the finding underlying the withholding of petitioner's removal under the Convention Against Torture—that, because petitioner deserted rather than continuing to work as a prison guard, he would be tortured if he returned to Eritrea (Pet. App. 7a-8a & 19a-20a)—confirms that the consequence of failing to obey his superiors' commands would have been death or severe injury.

Moreover, the legal rule that the government urges would apply to numerous individuals whose conduct plainly results from threats of death or injury, as the amicus briefs filed in this case make

clear. *E.g.*, Becket Am.Br. 8-9 (religious believers forced to torture co-religionists); HRF Am. Br. (11-13, 24-25 & 30-35) (use of torture, severe injury, threats of death, murder of family members to force victims to engage in persecution).[2]

This case is not about "simply following orders"; the issue is whether acts coerced by threats of death and severe injury trigger the persecutor bar.

Second, as we explain in our opening brief (Pet. Br. 24-25), this Court's decision in *Reves* v. *Ernst & Young* teaches that "participate" is limited by the context in which it is used. 507 U.S. 170, 177-179 (1993). Here, it is attached to a word, "persecution," that plainly excludes coerced conduct.

The government is wrong in asserting (Br. 21 n.6) that "'participate[] in persecution' 'must be broader' than 'persecution'" because "participate" otherwise would serve no purpose. Congress had to attach a verb to "persecution"; otherwise the provision would make no sense. "Participate[]" here, as in *Reves*, should be construed in accordance with its "common understanding * * * 'to take part in.'" 507 U.S. at 179 (quoting Webster's Third New International Dictionary 1646 (1976)). And, as in *Reves*, that common understanding incorporates the core re-

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[2] The government is correct (Br. 39-40) that not every person coerced by threats of death or severe injury to engage in persecutory acts is himself subjected to persecution. But, as the examples discussed on page 1 of this brief show, it frequently is the case that individuals subjected to persecution are forced—as part of that persecution—to engage in persecutory conduct against others. Under the government's view of the statute, such individuals in every case are barred from seeking a discretionary grant of asylum.

quirement of the term to which it is attached (there, "conduct"; here, "persecution"). Because one cannot "take part in" persecution in the plain meaning of that phrase if one acts without any element of moral blameworthiness, Congress's use of the term "participate" did not override the exclusion of coerced conduct inherent in "persecution."[3]

Third, the terms "assist[]" and "participate[]" do not appear by themselves in the statute. They are part of a series of terms: "ordered, incited, assisted, or otherwise participated in the persecution of any person * * *." 8 U.S.C. § 1101(a)(42)(B). This Court has long applied the principle of interpretation that "a word is known by the company it keeps" in order to "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

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[3] Indeed, a number of lower courts have relied on this reasoning in rejecting the government's position that subjective motivation is irrelevant to application of the persecutor bar, holding that "the term 'persecution' strongly implies both scienter and illicit motivation" and holding that the presence of the word "assist" does not vitiate that requirement. *Castañeda-Castillo* v. *Gonzales*, 488 F.3d 17, 20 (1st Cir. 2007) (en banc); see also *Vukmirovic* v. *Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (overturning application of the persecutor bar to an asylum-seeker whom the BIA had concluded had "participated in" persecution as a matter of "self-defense"); *Gao* v. *United States Att'y General*, 500 F.3d 93, 98 & 102-103 (2d Cir. 2007) (rejecting government's argument that "assist[]" permits application of persecutor bar even though applicant did not know that his actions would assist acts of persecution).

The first two words in this series—"ordered" and "incited"—plainly require volitional action and therefore exclude coerced conduct; the government does not contend otherwise. We have explained that the same is true of the term "participated." The government's argument, therefore, is that the inclusion of "assisted" in this series of words brings within the ambit of the statute conduct coerced by threats of death and serious injury.

But that result is precisely what the principle of interpretation forbids. It would give one word "a meaning so broad that it is inconsistent with its accompanying words" and would thereby expand the statutory provision far beyond what Congress intended.

Indeed, the consequences of the government's position are breathtaking. Application of the persecutor bar would turn solely on the "objective[]" characteristics of the individual's actions: subjective motivation would be irrelevant; the presence of coercion would be irrelevant; and—as the government has argued in the lower courts (see note 2, *supra*)—even the individual's knowledge of the consequences of his conduct would be irrelevant. Entirely blameless conduct would be labeled "persecution."

That extraordinarily broad reach—divorcing the statute entirely from the concept of moral blameworthiness that is at the center of the term "persecution" by analyzing in isolation (and incorrectly) the individual words of the statute—bears no resemblance to "what [Congress's] words will bring to the mind of a careful reader." *Watson* v. *United States*, 128 S. Ct.

579, 583 (2007). This Court should therefore reject the government's interpretation.[4]

The government advances another justification for applying the persecutor bar to coerced acts, pointing (Br. 22) to the persecutor bar's lack of a textual requirement of "voluntary" conduct, and the absence of an exclusion of "involuntary" conduct, in contrast to the inclusion of those terms in four other immigration provisions.

The provisions cited by the government each describe acts—membership in an organization, renunciation of citizenship, seeking another country's protection—that, unlike the term "persecution," do not inherently exclude coerced conduct. Congress had to include the term "voluntary" (or exclude "involuntary" acts) in those provisions, because they otherwise might be construed to include involuntary acts. Moreover, the use of "voluntary" as a modifier excludes a broader range of conduct than acts coerced by threats of death or serious injury. Pet. Br. 45. Its inclusion in those provisions therefore does not support an inference that Congress intended to encom-

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[4] In addition, the term "assisted," when included with "ordered, incited, * * * and * * * participated," is most logically understood to reference the doctrine of aiding and abetting. In both the criminal and civil contexts, aiding and abetting requires proof that the defendant has associated himself with the wrongful enterprise; coerced conduct would not suffice. See Pet. Br. 25-26 & n.6.

The government responds (Br. 21) that Congress did not use the words "aid" or "abet." That is true, but the question here is how to interpret the term "assisted" so that it is consistent with the other words in the series. The aiding and abetting doctrine, which is applied both civilly and criminally, provides a strong analogy.

pass that narrower category of coerced conduct every time it did not include the term "voluntary."

Finally, and significantly, none of these provisions include the verbs "assisted" or "participated." They accordingly provide no support for the government's argument here, that the inclusion of those words overrides the limitation inherent in "persecution."

2. *Applicable principles of statutory interpretation exclude involuntary acts.*

The government argues (Br. 23-25) that no background legal principle supports interpreting the persecutor bar to exclude coerced conduct because the "duress defense" is a criminal law principle inapplicable here. The government is mistaken, both about the scope of the background principle and its applicability to this case.

a. Even if the background principle were limited to the criminal law, it would apply here, because the statutory context makes clear that the persecutor bar was designed to exclude only criminal conduct.[5]

The government recognizes (Br. 42) that Congress enacted the statute containing the persecutor bar to implement its obligations under the Protocol

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[5] There can be no serious dispute that the principle is well-recognized in criminal law, as this Court has made clear. *Dixon* v. *United States*, *supra*. The case cited by the government (Br. 25)—*United States* v. *White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974)—proves the point. The court there refused to recognize lack of *mens rea* as a defense, but recognized that coercion *would* constitute a defense: "[i]f thieves overpowered [the defendant's] watchmen and somehow caused a pipe to overflow, [the defendant] would not be liable." *Id.* at 624.

Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967), and the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (entered into force Apr. 22, 1954). See also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 436-437 (1987); Pet. Br. 32-34.

The exclusion clauses required by these instruments are expressly limited to criminal conduct. Article 1(F) of the Convention excludes from the Convention's protections "any person with respect to whom there are serious reasons for considering that":

> (a) he has committed a *crime* against peace, a war *crime*, or a *crime* against humanity * * *.

189 U.N.T.S. 156 (emphasis added). And the *United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979)—which this Court has held to "provide[] some guidance in construing the provisions added to the INA by the Refugee Act" (*INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999))—authoritatively interpreted the Protocol's "exclusion clauses" to apply only to asylum-seekers whose "acts [are] of a criminal nature." *Handbook*, ¶ 162.[6]

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[6] This Court's recognition in *Aguirre-Aguirre* of the relevance of the *Handbook* disposes of the government's claim (Br. 46) that the *Handbook* should be disregarded because it was not expressly referenced in the legislative history. The government is also wrong in asserting that the *Handbook* should be disregarded because it cannot "trump" the Attorney General's interpretation of the statute. The *Handbook* is relevant in determining the meaning of the words Congress used. If those words, interpreted using all applicable tools of construction, are unambiguous, then that is the meaning of the statute; in the absence of ambiguity, there is no occasion to defer to the administrative construction.

Because the treaty obligations permit only the exclusion of criminal conduct, and Congress enacted the persecutor bar to conform domestic law to those obligations, the only possible conclusion is that Congress intended the exclusion to describe a criminal violation. And the general background rule applicable to a statutory provision describing a criminal violation is that it does not extend to coerced conduct.[7]

The government asserts (Br. 45) that the Convention does not require recognition of a duress defense. But the Convention permits exclusion only if the individual has committed a crime "as defined in the international instruments drawn up to make provision in respect of such crimes" (Art. 1(F)), and the authorities available at the time the Convention was drafted—decisions from the war crimes trials that followed World War II—recognized coercion as a defense to crimes encompassing persecution of individuals on account of protected characteristics. See Int'l Law Scholars Am. Br. 29-31 (collecting materials).[8] Interpreting the persecutor bar to exclude co-

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[7] The government points (Br. 45) to the fact that the Treaty states that exclusion is permissible if there are "serious reasons for considering" that the asylum applicant has committed one of the specified crimes. This language clearly relates only to the standard that must be met by the evidence of criminal activity; it does not in any way address the substantive requirements governing proof of criminality. That fact is confirmed by the statement in the *Handbook* that "all the relevant factors—including any mitigating circumstances—must be taken into account." ¶ 157.

[8] Although the United States is not a party to the treaty creating the International Criminal Court, that treaty often has been cited as a codification of principles of international law. See, *e.g.*, Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 Geo. L.J.

erced conduct is therefore not only warranted by the background legal principle; it also is necessary to comply with the obligations imposed by the Convention.

The government argues (Br. 23) that the background principle should not apply because "[w]hen Congress has intended an alien's eligibility for an immigration benefit to turn on the application of criminal law, it has said so explicitly." But here the relevant treaty obligation expressly requires that the exclusion turn on criminal behavior, making such a reference in the statute unnecessary. Moreover, Congress could not make the applicability of the bar turn upon a conviction, because it sought to exclude persons who engaged in persecution but were not prosecuted. And Congress could not reference a provision of domestic law, because the crime involved is a violation of international law.

The government also states (Br. 23) that "interpretation of the governing statute is for the Board in the first instance, and this Court should not lightly overturn the Board's judgment that there is no duress exception." But interpretation is "for the Board in the first instance" only if the statute is ambiguous. The background interpretive principle on which we rely is used by the courts to determine whether statutory language is ambiguous. After all, if Congress in reliance on this principle felt no need to include an express coercion defense, the language Congress wrote has no ambiguity.

381, 422-423 (2000). Art. 31(1)(d) of the treaty recognizes a duress defense to criminal liability. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

b. Moreover, the background principle that the legal significance of an act is vitiated by coercion is not limited to the criminal law. It is well established in contract law. See Restatement (Second) of Contracts §§ 174 & 175 (1981) (contract is void if manifestation of assent is compelled by physical duress and voidable if manifestation of assent is induced by threats of use of physical force).[9] And this principle is applied in other areas of civil law. See, *e.g.*, *Lyden* v. *Howerton*, 783 F.3d 1554, 1557 (11th Cir. 1986) (duress defense to violations of 8 U.S.C. § 1323); *Furnish* v. *Comm'r*, 262 F.2d 727 (9th Cir. 1958) (duress defense recognized in civil tax fraud action; remand for assessment of evidence that wife was afraid of her husband).[10]

Given the broad recognition of this principle, it is appropriate to interpret the persecutor bar to exclude conduct coerced by threats of death or serious injury.

3. *The statutory context confirms that the persecutor bar does not encompass coerced conduct.*

Congress's objective of implementing the United States' obligations under the UN Protocol Relating to the Status of Refugees provides additional support

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[9] We cited this contract law principle in our opening brief (at 29-30 n.7) and the government offered no response.

[10] The government's reference (Br. 24) to *MCM Partners, Inc.* v. *Andrews-Bartlett & Assocs.*, 62 F.3d 967 (7th Cir. 1995), is inapposite because that case involved only economic threats, not threats of death or severe injury. Surely the government does not mean to suggest that a CEO forced at gunpoint to agree to prices dictated by a competitor could be held liable for price-fixing.

for the conclusion that coerced conduct is not included within the persecutor bar.

In interpreting the obligations imposed by international instruments, this Court accords "'considerable weight'" to the "'opinions of our sister signatories.'" *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted); see also *Vimar Seguros y Reaseguros S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 536-537 (1995) (declining to construe a statute in a manner contrary to the decisions of other countries interpreting a related international convention). A number of other nations that are parties to the Protocol and Convention recognize duress as a defense to application of their domestic implementations of the Article 1F(a) persecutor bar. See Int'l Scholars Am. Br. 25-28; UNHCR Am. Br. 15-17.

Because Congress enacted these provisions to bring the United States into compliance with its treaty obligations, the fact that other nations concluded that those obligations required exclusion of coerced acts from the persecutor bar weighs in favor of a determination that Congress reached the same conclusion and that the provisions here should be construed in the same manner.

The government complains (Br. 44 n.20) that only a relatively few countries have recognized that the persecutor bar does not encompass coerced conduct. But these countries include Canada, the United Kingdom, and Australia, nations with whom the United States shares a common legal tradition. The government does not point to *any* signatories to the treaties who have categorically rejected duress as a defense to the persecutor bar. Given the Convention's clear reference to criminal conduct, and the *Handbook*'s clear statement that "all the relevant

factors—including any mitigating circumstances—must be taken into account" (¶ 157), it is not surprising that the nations that have addressed the issue have reached this conclusion.

We explained in our opening brief (Pet. Br. 34-35) that the 1980 Refugee Act, the statute containing the provisions at issue here, was enacted to create a refugee protection regime applicable to all future conflicts that would provide "sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449 (internal quotation marks omitted). That fact, the particular language used, and the objective of complying with international obligations make the persecutor bars in statutes enacted to address refugees from specific countries irrelevant in interpreting the provisions before the Court.

The government nonetheless points (Br. 34-35) to four statutes enacted to address specific conflicts, asserting that they somehow provide guidance in construing the provisions here. These statutes, and the decisions interpreting them, are irrelevant. *First*, two of the statutes—the 1950 DPA amendment and the Refugee Relief Act—contain language different from the provisions before the Court, excluding "any person who advocated or assisted in the persecution of any person" or "who personally advocated or assisted in the persecution of any person or group of persons." That language bears little resemblance to the text of the provisions enacted in 1980: "ordered, incited, assisted, or otherwise participated in the persecution of any person."

Moreover, these two statutes were adopted to prevent admission of persons who supported the

German National Socialists and their allies. Each of the decisions under those statutes cited by the government involves such an individual. And in each case involving a claim of coercion, the court of appeals applied this Court's decision in *Fedorenko*. Because of the different statutory text and historical context, and the clear inapplicability of *Fedorenko* to the provisions now before the Court (see pages 20-23, *infra*), these provisions shed no light on the appropriate resolution of this case.

Second, the statute enacted in 1977 related to refugees from southeast Asia. Because there are no judicial interpretations of its language, this measure does not support the government's claim that coerced conduct triggers the persecutor bar enacted in 1980. Certainly the statement by a single legislator that the provision was "modeled on" prior laws (see U.S. Br. 35) provides no basis for so construing the statute.

Third, the 1978 Holtzman Amendment is another statute addressing exclusion and removal of aliens associated with the Nazi regime. The government cites only a single decision addressing the coercion issue, and that decision relies solely on *Fedorenko*. *Naufalis* v. *INS*, 240 F.3d 642, 645 & 646 (7th Cir. 2001); but see *Petkiewytsch* v. *INS*, 945 F.2d 871, 880-881 (6th Cir. 1991) (interpreting Holtzman Amendment to permit consideration of coercion and holding provision inapplicable in part because conduct was involuntary).[11] Again, the different histori-

[11] The second decision cited by the government—*Maikovskis* v. *INS*, 773 F.2d 435 (2d Cir. 1985)—relates to subjective motivation, not coercion.

cal context and the inapplicability of *Fedorenko's* reasoning here render this decision irrelevant.

These conflict-specific statutes thus shed no light on the meaning of the generally applicable provisions adopted to fulfill specific international obligations.

4. Construing the statute in accordance with its plain meaning will not produce adverse consequences.

The government suggests (Br. 24) that a "significant effort" would be required to define the coercion standard. But the federal courts have already defined such a standard in the criminal context (Pet. Br. 38 & n.10), and there is no obstacle to application of that standard here. Of course, the Attorney General would be able to exercise his authority to make the standard more specific, either in interpreting the persecutor bar or by invoking his discretion to define the circumstances in which a "refugee" may receive asylum. See Pet. Br. 37.

The government also claims (Br. 39 n.15) that interpreting the persecutor bar to exclude coerced conduct might somehow burden "affirmative claims for asylum and withholding of removal." The argument seems to be that if an asylum applicant seeks to establish he was persecuted by individual X, he would be obliged to demonstrate that X was not acting involuntarily at another's behest—and presumably so on, *ad infinitum*. This fear is wholly specious.

To be eligible for asylum, an individual need only establish the he or she is "unable or unwilling to return to * * * that country because of persecution or a well-founded fear of persecution on account of" a protected characteristic. 8 U.S.C. § 1101(a)(42)(A). The applicant need not prove that a particular individual

"ordered, incited, assisted, or otherwise participated in" that "persecution." The meaning of those words—which is the issue here, because the government does not dispute the meaning of "persecution" (see page 4, *supra*)—therefore cannot affect the burden of an asylum applicant. See also Int'l Scholars Am. Br. 8-9 & n.3.

The government simply is not able to identify a practical obstacle to interpreting the statute in accordance with its plain language.[12]

B. *Fedorenko* Provides No Support For The Government's Position.

The government's argument that this Court's decision in *Fedorenko* supports its position is based on the government's assertion (Br. 30) that "[t]he text of the persecutor bar at issue in *Fedorenko* is repeated" in the statutory language now before the Court. That is simply wrong.

The provision in *Fedorenko* excluded from the definition of "refugee" or "displaced person" any

> person who can be shown
>
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or

---

[12] Even if, contrary to our submission, coerced conduct may trigger the persecutor bar, that does not mean that the presence of coercion is irrelevant in determining whether particular conduct constitutes "assist[ing] * * * in * * * persecution" within the meaning of the statute. See Pet. Br. 39. The government's conclusory response (Br. 27) provides no reason why coercion, along with other factors, should not be considered in applying that standard.

> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.

Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, § 2(b), 62 Stat. 1009 (incorporating Annex I to the Constitution of the International Refugee Organization of the United Nations, Part II § 2).

The statutes now before the Court state:

> The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(B); see also *id.* §§ 1158(b)(2) & 1231(b)(3) .

These provisions are very different. They use dissimilar sentence structure and do not employ the same words: "assisted" and different forms of the verb "persecute" are the only similarities. There is accordingly no basis for concluding that *Fedorenko*'s interpretation of the DPA language controls the meaning of the wholly different provisions of the INA.

Moreover, the particular differences between the two provisions confirm that it would be inappropriate to apply *Fedorenko*'s holding to the INA. *First*, the DPA provision applied to persons who "assisted *the enemy*" (emphasis added). The use of this phrase makes clear that the provision focused on a very specific set of individuals—persons who collaborated with our country's enemies during wartime.

The DPA provision is even more specific, targeting individuals who "assisted the enemy *in persecuting civilian populations*" (emphasis added). It therefore focuses exclusively on persons who engaged in persecution in connection with the worst crime against humanity ever perpetrated.

The language used in the DPA is thus closely linked to the very specific factual circumstance to which it applied. See Pet. Br. 42-43; American Jewish Congress Am. Br. 8-9 (the DPA was adopted in response to "an immediate post-World War II crisis that combined the humanitarian need for easing the burden posed by over a million European refugees with a desire for retribution against recently vanquished aggressors" and "was particularly concerned with ensuring this country's aid and protection did not extend to its recently defeated enemies or their sympathizers"). Congress had every reason to attach more definitive, and harsher, consequences in the very specific factual context addressed in the DPA.

In adopting the persecutor bar provisions in the Refugee Act of 1980, by contrast, Congress sought to create an asylum system applicable to persons seeking refuge from any future conflict, including those escaping from conflicts to which the United States was not a party. Congress's goal was to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world." *Cardoza-Fonseca*, 480 U.S. at 449. These objectives could not be more different from the conflict-specific considerations that surrounded adoption of the DPA. That distinction confirms that the meaning accorded to the

DPA should not be transported to the very different language and very different context of the 1980 Act.[13]

Second, as we explained in our opening brief (Pet. Br. 44-45), the structure of the two statutes is materially different. Under the DPA, a finding that the persecutor bar did not apply meant that the applicant was entitled to admission into the United States, subject to quotas and other numerical restrictions. A finding that the INA bar does not apply simply makes the refugee *eligible* to be *considered* for asylum. The Attorney General retains considerable discretion to deny asylum.[14]

Thus, contrary to the government's unsupported assertion (Br. 32), there is a clear explanation for why Congress would have wanted to treat those subject to coercion differently under the two statutes. Given the different statutory language, structure,

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[13] The government (Br. 5, 32) mischaracterizes the facts in an attempt to analogize petitioner to a Nazi death camp guard, recasting petitioner's assigned duties as though they were his actual deeds. But the Immigration Judge, the BIA, and the court below all agree that petitioner did not carry out the heinous tasks his oppressors wished him to, and that there is "no evidence to establish that [petitioner] * * * mistreated the prisoners." Pet. App. 16a; see also *id.* 2a-3a (Fifth Circuit acknowledging that petitioner "did not affirmatively, personally injure the prisoners, and he objected to, and occasionally disobeyed, orders to inflict punishment, [and] did favors for prisoners"). Moreover, as we discuss above (at 5) and in our opening brief (at 43 n.12), petitioner was not simply "following orders." He was coerced to remain as a prison guard by threats of death and severe injury. Compare Pet. Br. 43 n.12 (discussing Fedorenko's conduct).

[14] The government's statement (Br. 31-32 n.13) that the INA's persecutor bar does not confer discretion is a non-sequitur. The Attorney General's discretion comes from other parts of the statute. See Pet. Br. 37.

and context, there is no basis for transforming the *Fedorenko* decision into "a misapplied mechanism for excluding all aliens who, forced under threat of death or torture to assist in violence, seek refuge in this country from that violence." American Jewish Congress Am. Br. 1-2.[15]

Finally, the *Fedorenko* Court's rationale does not apply to the different statutory language here. The Court compared the two subsections of Section 2, observing that the word "voluntary" appeared in subsection (b) but not in subsection (a), and concluded that the "deliberate omission of the word 'voluntary' from § 2(a) compels the conclusion that the statute made *all* those who assisted in the persecution of civilians ineligible for visas." 449 U.S. at 512 (emphasis in original). Because the INA provisions contain-

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[15] The government asserts (Br. 31) that Congress's recodification of the current persecutor bar in 1996, following the decision in *Fedorenko*, somehow ratified application of the *Fedorenko* analysis to the INA provisions. But Congress did not reenact the DPA text interpreted in *Fedorenko* (which was never part of the INA); it adopted the substantially different statutory language of the Refugee Act of 1980.

The government also contends (Br. 31) that the 1996 recodification ratified the BIA's dictum in *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), that *Fedorenko* applies to the INA (see pages 26-27, *infra*). This Court has made clear, however, that Congress must be aware of an administrative interpretation in order to ratify it. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) (when there is no evidence that Congress was aware of the administrative interpretation, this Court "'consider[s] the . . . reenactment to be without significance'") (quoting *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957); *SEC* v. *Sloan*, 436 U.S. 103, 120-121 (1978). The government does not provide any evidence that Congress was aware of this single sentence in a single decision of the Board of Immigration Appeals.

ing the persecutor bar do not include subsections utilizing the word "voluntary," the *Fedorenko* Court's finding of a "*deliberate* omission of the word 'voluntary'" (emphasis added)—deliberate because "voluntary" *was* present in the other subsection of the very same provision, which had been adopted at the same time as the subsection containing the persecutor bar—does not apply to the INA.

The reasoning in *Fedorenko* thus supports our contention that the plain meaning of "persecution" excludes coerced conduct. The Court did not rest its decision on a determination that "persecution" encompasses involuntary acts. To the contrary, it held that the language before the Court encompassed involuntary acts only because of the "deliberate" omission of the term "voluntary." The clear implication of the Court's analysis is that the term "persecution" standing alone, without the inference from the deliberate omission of "voluntary," would not include coerced acts.[16]

C. Even If The Statutory Language Were Ambiguous, It Should Be Interpreted To Exclude Coerced Conduct.

The government's brief is replete with requests for deference to the administrative construction of the persecutor bar. But the question of deference arises only if the statute's meaning remains ambiguous following application of the ordinary tools of statutory interpretation. *Chevron U.S.A. Inc.* v.

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[16] As we discuss above (at 9-10), the government's reliance (Br. 30-31) on the presence of "voluntary" in other, unrelated provisions of the INA similarly provides no basis for concluding that Congress intended the INA persecutor bar to reach coerced conduct.

NRDC, 467 U.S. 837, 842-843 (1984); *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). See also Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2109 (1990).

When, as here, the statute's meaning is plain when those tools are applied, it is irrelevant that the BIA has subjected the provisions to a more narrow administrative definition. Indeed, it has become routine for courts to reject the BIA's interpretations of the immigration laws on the ground that they are inconsistent with the plain meaning of the relevant statutory provision.[17]

Here, moreover, the ordinary tools of statutory interpretation include the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. Because this principle was well recognized at the time that Congress wrote the persecutor bar, Congress would have assumed that it would have been applied to resolve any ambiguities in the

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[17] See, *e.g.*, *Prieto-Romero* v. *Clark*, 534 F.3d 1053, 1061 (9th Cir. 2008); *Zhang* v. *Mukasey*, 509 F.3d 313, 316-317 (6th Cir. 2007); *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 305-307 (2d Cir. 2007) (en banc), cert. denied *sub nom. Zhen Hua Dong* v. *Dep't of Justice*, 128 S. Ct. 2472 (2008); *Alaka* v. *Attorney General*, 456 F.3d 88, 106-108 (3d Cir. 2006); *Okeke* v. *Gonzales*, 407 F.3d 585, 593-597 (3rd Cir. 2005) (Ambro, J., concurring); *Lagandaon* v. *Ashcroft*, 383 F.3d 983, 987-989 (9th Cir. 2004); *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 224-225 (3d Cir. 2004); *Valansi* v. *Ashcroft*, 278 F.3d 203, 208-210 (3d Cir. 2002); *White* v. *I.N.S.*, 75 F.3d 213, 215 (5th Cir. 1996).

statute. If the statutory language were ambiguous, this principle would be dispositive here.[18]

Even if the statutory language were ambiguous and this principle did not exist, there would be no basis for deferring to the government's construction of the statute.

To begin with, the government points to only two BIA decisions that it claims address whether coerced acts are encompassed under the persecutor bar—*In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), and the decision in the present case. It cites numerous other administrative decisions (see Br. 14-18), but they address the subjective motivation issue or persecution more generally. Neither of the two decisions cited by the government meets this Court's criteria for deference.[19]

The Court has made clear that deference is appropriate when the administrative decisionmaker exercises his or her discretion. See Pet. Br. 47. The entire discussion of the issue in *Rodriguez-Majano* consists of the following:

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[18] The government complains (Br. 51) that application of this principle would "usurp the Attorney General's * * * authority to resolve statutory ambiguities in the first instance * * *." But that authority applies only if the congressional text is ambiguous. Because Congress when it wrote the persecutor bar would have assumed that any ambiguity would be resolved in favor of the asylum applicant, utilization of the canon of construction is necessary to determine whether Congress's text is ambiguous.

[19] The government also cites *In re Fedorenko*, 19 I. & N. Dec. 57 (BIA 1984), but that decision—relating to a deportation proceeding initiated following this Court's 1981 decision—relates to the DPA, not the statute at issue here.

> The participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. *See Fedorenko v. United States*, 449 U.S. 490 (1981).

19 I. & N. Dec. at 814. As a threshold matter, the statement was dictum; the Board ruled in favor of the asylum applicant on the ground that his conduct did not amount to persecution. *Id.* at 816.

Moreover, the Board provided no reasoning whatsoever other than a citation of this Court's decision in *Fedorenko*. The only plausible conclusion is that the Board believed itself bound by this Court's interpretation of a different statute in *Fedorenko*. It therefore was not exercising its expert judgment to determine that the *Fedorenko* rule should apply to the INA. Rather, it assumed that the Court's ruling in *Fedorenko* required the same outcome under the INA's persecutor provisions. This interpretation of the statute accordingly is not entitled to deference.

The opinion below also makes clear that the Board did not exercise independent judgment in arriving at its view of the statute. After concluding that petitioner had engaged in conduct constituting persecution and that petitioner's motivation was irrelevant (Pet. App. 6a), the Board turned to the coercion issue and stated that even if petitioner's conduct was limited to guarding prisoners

> he is still subject to the so-called 'persecutor bar' under our precedential decision in *Matter of Fedorenko, supra*, as he has not demonstrated that his conduct is distinguishable from that of the alien in that case * * *.

Id. at 7a. The Board thus relied entirely on its decision in *In re Fedorenko*, which involved the DPA, and

did not address the meaning of the statute now before the Court.

The Board went on to state:

> We also note that the United States Court of Appeals for the Fifth Circuit, under whose jurisdiction this case arises, also has applied the persecutor bar in sections 208(a)(2)(A)(i) and 241(b)(3)(B)(i) of the Act to aliens, like [petitioner], who argue that they were forced into assisting in the persecution of others. *See Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003).

Pet. App. 7a. Again, the Board did not exercise its own judgment, or provide any reasoning whatever in support of its conclusion, but rather pointed to the controlling interpretation of the statute adopted by the court of appeals.

Thus, the Board has neither examined the different language and context of the provisions at issue here, nor assessed the policy implications of the possible interpretations of those provisions. Given this complete absence of independent reasoning, there is no basis for deference to the government's view of the statute.[20]

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[20] The government suggests (Br. 48) that deference is required because a decision to grant asylum might harm foreign relations. But under petitioner's interpretation of the statute, the Attorney General retains complete discretion to deny asylum to anyone, so that eventuality could never arise. It is the government's rigid across-the-board rule closing the door to a large number of asylum applicants that would cabin the Executive's latitude in foreign affairs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2008

AMICUS CURIAE BRIEF

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(10)

Supreme Court, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-499

In the Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations: Its History and Work 1946 – 1952* (1956).....8, 9, 10, 12

International Refugee Organization Manual for
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Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97 (1986).....16, 18

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INTEREST OF *AMICUS CURIAE*[1]

The Advocates for Human Rights

The Advocates for Human Rights is a non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights provides *pro bono* legal assistance to indigent asylum seekers in the Upper Midwest. The Advocates for Human Rights has a strong interest in seeing that the United States construes legal protections for refugees in a way that is consistent with international human rights standards and that does not leave actual victims of persecution outside its reach.

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this amicus curiae brief, and their written letters of consent accompany it for filing with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, the amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's "objective effects" test used to determine whether an asylum applicant "assisted" persecution clashes with this Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981) because it does not allow for nuanced line-drawing between the victims and perpetrators of persecution. According to *Fedorenko*, the Displaced Persons Act of 1948 (DPA)—although on its face excluding from the United States *all* persons who assisted Nazi persecution—did not compel treating demonstrably innocent holocaust survivors who were forced to labor in concentration camps as "assistants" in the persecution of their fellow prisoners. Although this may seem obvious, in key footnote number 34, Justice Marshall acknowledged that future cases might present "difficult line-drawing problems" requiring close analysis of whether the particular conduct of apparent victims crossed the line into "assisting" persecution.

Lower courts have since disagreed about the meaning of footnote 34. The Fifth Circuit reads *Fedorenko* to measure assistance by the "objective effects" of the particular conduct in question and prohibits consideration of voluntariness, intent, or other factors going to personal moral culpability. Other courts take the opposite view and engage in a searching evaluation to determine whether an individual's conduct demonstrates personal culpability to the degree it may be fairly deemed assistance.

The DPA provisions concerning assistance to persecution shed light on *Fedorenko's* famous footnote. When Congress passed the DPA, it lifted the definition of "displaced person" from Annex I of the Constitution of the International Refugee Organization (IRO). Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009, 3037–55 (1948). The overarching purpose of the IRO constitution was to identify *bona fide* refugees and displaced persons, carefully distinguishing them from undeserving persecutors and other war criminals or traitors. The IRO constitution identified Jewish concentration camp survivors as victims of Nazi persecution and specified that the labor the Nazis forced them to perform in the camps did not render them "persecutors," but rather could qualify them as displaced persons. In other words, absent extraordinary evidence of individual culpability, the IRO's categorical exclusion for those who "assisted" the persecution of civilians *did not* apply to Jewish concentration camp survivors who were victimized through forced labor. Clearly, then, the DPA did not measure assistance solely by an "objective effects" standard.

The Board of Immigration Appeals (BIA) decisions that first endorsed the "objective effects" test rest on fundamental errors of logic and interpretation. A close reading of *Fedorenko*—from which the BIA holdings derive—demonstrates that the Court's holding actually turned on evidence of Fedor Fedorenko's personal culpability, including evidence this his actions as an armed guard were

voluntary to a meaningful degree. For years, lower courts applying *Fedorenko* in Nazi deportation and denaturalization cases had no occasion to clarify footnote 34 because almost all of these cases involved conduct by Nazi persecutors and collaborators that—without question—established personal culpability. But, as more courts are recognizing, asylum claims present the difficult line-drawing problems *Fedorenko* anticipated.

Given the statutory differences between the DPA and the asylum and withholding of removal provisions of the Immigration and Nationality Act (INA), it is highly questionable whether *Fedorenko* applies to this case at all. But if *Fedorenko* holds some relevance in asylum cases, this Court should reject the Fifth Circuit's unsupportable "objective effects" test as contrary to established precedent. By adopting a narrow view of *Fedorenko* and refusing to consider evidence of individual culpability, the Fifth Circuit permits unjust, inequitable results in hard cases and exhibits a disturbing indifference toward the victims of persecution our asylum laws were meant to protect.

This Court should instead articulate and adopt a standard of assistance to persecution that turns on individual culpability because asylum claims will continue to present the difficult line-drawing problems that litigation over Nazi persecution almost never did. *Fedorenko* and subsequent lower court decisions point to a number of important factors that courts should consider when assessing whether an individual's particular conduct assisted

persecution. These include voluntariness, shared persecutory motive, membership in the persecuting organization, the directness or indirectness of involvement in acts of persecution, knowledge, and redemptive acts.

ARGUMENT

I. CIRCUIT COURTS OFFER COMPETING INTERPRETATIONS OF *FEDORENKO*

Fedorenko held that the DPA "made *all* those who assisted in the persecution of civilians ineligible for visas [to the United States]," and that because the specific DPA provision targeting persons who assisted Nazi persecution contained no "voluntariness requirement," "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made [Fedorenko] ineligible for a visa." 449 U.S. at 512 (emphasis added). Because Nazis forced Jewish prisoners to labor in the same camps where guards like Fedorenko served, this Court acknowledged that without a categorical exception for involuntary assistance the DPA might be read to deny visas to Jewish death camp survivors along with the armed guards who imprisoned them. *Id.* at 511 n. 33.

In footnote 34, Justice Marshall offered a "solution" to this concern, explaining that in certain cases courts might have to resolve "difficult line-drawing problems" so as to distinguish those truly responsible for assisting Nazi persecution from those who were innocent victims of it. *Id.* at 512 n. 34.

Footnote 34 described drawing lines along a continuum, "focusing on whether particular conduct can be considered assisting in the *persecution* of others." *Id.* At one end of the continuum was the Jewish prisoner "who did nothing more than cut the hair of female inmates before they were executed," and at the far opposite end was Fedorenko, "who was issued a uniform and armed with a rifle and pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp[.]" *Id.* Justice Marshall did not elaborate on the nuances of the line-drawing test, both because the case did not present a "difficult line-drawing problem," and, it seems likely, because this Court understood that the United States had not and would not treat Jewish death camp survivors as assistants to their own Nazi persecutors.

Few of the many reported cases involving persons accused of assisting Nazi persecution have presented difficult line-drawing problems. See Section III.D *infra*. But hard questions about assistance do arise with some frequency in the distinct context of asylum claims. Courts have looked to *Fedorenko* in the asylum context, but disagree about the meaning of footnote 34 and the type of evidence they must consider. The Fifth Circuit reads *Fedorenko* to impose a narrow "objective effects" standard, whereby courts evaluate an individual's particular conduct from a purely objective standpoint and only to determine whether it in fact furthered acts of persecution. *See Bah v. Ashcroft*, 341 F.3d 348, 351

(5th Cir. 2003). Under this strict liability approach, evidence of voluntariness, subjective intent, and other factors going to the individual's moral culpability are irrelevant. *Id.* Other courts, looking to the specific evidence Justice Marshall weighed in Fedorenko's case, have come to the opposite conclusion and engage in a particularized evaluation to determine whether, given the totality of circumstances, an individual's conduct is personally culpable to the degree it may be fairly deemed assistance. *See Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004); *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir 2001). Those other courts that do not explicitly take voluntariness into account still cast the determination of whether one assisted in persecution as a question of personal culpability. *See, e.g., Chen v. United States*, 513 F.3d 1225, 1259 (11th Cir. 2008); *Ofusu v. McElroy*, 98 F.3d 694, 701 (2d Cir. 1996).

Both the DPA and this Court's *Fedorenko* decision support a personal culpability test as identified by the majority of Circuits. The Fifth Circuit's "objective effects" test, which runs counter to the DPA and *Fedorenko*, should be rejected.

II. THE DPA DID NOT ADOPT AN OBJECTIVE EFFECTS STANDARD.

A. The DPA and the International Refugee Organization

Congress passed the DPA in 1948 so that certain Europeans who remained displaced after World War

II could resettle in America in larger numbers than existing visa quotas allowed. 62 Stat 1009. In 1946, member states of the United Nations, led by the United States, established the IRO as a temporary agency to protect, repatriate, and resettle an unprecedented number of war refugees and displaced persons. *See* L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations: Its History and Work 1946 - 1952* 1-54 (1956).[2] By 1948, the IRO had helped repatriate or resettle millions of people, but many hundreds of thousands still remained in its camps. Pressure for legislation that would help empty the camps mounted. The unassimilated refugee population was considered a serious obstacle to the Marshall plan and its goal of achieving stability in post-war Europe. 94 Cong. Rec. H3523 (daily ed. Mar. 25, 1948) (statement of Rep. Chelf); 94 Cong. Rec. H7739 (daily ed. June 10, 1948) (statement of Rep. Fellows). The United States had assumed responsibility for the largest share of the IRO's operating budget, requiring Congress to appropriate over $70,000,000 each year. 94 Cong. Rec. H7739 (daily ed. June 10, 1948) (statement of Rep. Fellows). In addition, coalitions of religious and social service organizations had organized to lobby Congress for a generous, humanitarian response. 94 Cong. Rec. S6586-87 (daily ed. May 27, 1948); 94 Cong. Rec. A1601-02.

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[2] The *Fedorenko* Court looked to Holborn's comprehensive history of the IRO. 449 U.S. at 495 n. 5.

When Congress began to debate competing bills in early 1948, the IRO counted 611,071 displaced persons living inside its camps with another 225,918 subsisting in communities surrounding them. 94 Cong. Rec. S6567 (daily ed. May 27, 1948) (statement of Sen. Ferguson). The Jewish population made up about 23% of this total. Most of the Jews were holocaust survivors who had attempted to resettle in Poland and other eastern European countries following the war, but later fled renewed anti-Semitic violence. *Id.* at S6806 (daily ed. June 1, 1948); 94 Cong. Rec. H8861 (daily ed. June 18, 1948) (statement of Rep. Celler).

The final DPA legislation provided just over 200,000 special visas to be issued to "eligible displaced persons" over a two-year period. 62 Stat. 1009. Congress lifted its definition of "displaced person" from the text of the IRO constitution, defining "displaced person" as "any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." *Id.*

B. The DPA Definition of "Displaced Person"

The IRO constitution was drafted in accordance with the UN General Assembly resolution of February 12, 1946, which set forth key principles for the repatriation or resettlement of war refugees and displaced persons. *See* Annex III, IRO Constitution, 62 Stat. 3037, 3054; Holborn, *supra*, at 29-39. UN

member nations debated these principles at length before unanimously adopting the resolution, and its terms reflect a delicate compromise between western democracies that favored broad resettlement opportunities for the displaced, including political dissidents, and Soviet bloc nations that preferred narrower terms that would tend to repatriate more of their citizens. *Id.* The resolution identified as its overarching concern, "the necessity of clearly distinguishing between genuine refugees and displaced persons on the one hand, and ... war criminals, quislings, and traitors ... on the other," the same concern this Court faces here. *Id.*

Annex I of the IRO constitution highlighted this same dichotomy between deserving war victims and undeserving war criminals, embedding it in a complex set of rules that defined eligibility for IRO assistance. 62 Stat. 3051-52. The Annex is organized under three main headings. The first is titled "General Principles." This is followed by Part I, which has four sections A-D. Part I, sections A and B provide the technical definitions of "refugees" and "displaced persons." Part I, section C describes the conditions under which refugees and displaced persons would be deemed "of concern" to the IRO so as to qualify for assistance, while Part I, section D describes the separate conditions that could cause a refugee or displaced person "of concern" to the IRO to then lose that status. Finally, Part II lists the categorical grounds of exclusion that describe "Persons who will not be the Concern of the Organization."

In practice, an applicant for IRO assistance had to pass a three-stage test. First, he had to show he was either a "refugee" or "displaced person." *International Refugee Organization, Manual for Eligibility Officers* No. 241, ch. I, p. 5 (undated, circulated in 1950) (IRO Manual).[3] Second, he could not be categorically excluded by the provisions of Part II. *Id.* Passing these first two stages qualified an applicant as a *bona fide* refugee or displaced person, but he would still have to prove under Part I, Section C that he had "valid objections" to returning to his country of origin (*e.g.*, persecution, valid political opposition to the home government, or compelling humanitarian concerns). *Id.* Only then did the applicant become "of concern" to the IRO and receive assistance. *Id.*

The "General Principles" prefacing Annex I provide that all Annex terms are to be applied in an *equitable* manner. 62 Stat. 3051. Indeed, "[t]he main object of the Organization will be to bring about a rapid and positive solution of the problem of *bona fide* refugees and displaced persons, which shall be *just and equitable* to all concerned." *Id.* (emphasis added); IRO Manual, ch. II, p. 8. The final paragraph reiterates the same need to "ensure the impartial and equitable application" of the Annex's eligibility provisions in individual cases. 62 Stat. 3051. The General Principles section is not

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[3] The manual provided officers who screened applicants in the camps authoritative commentary to the IRO Constitution and its Annexes. Holborn, *supra*, at 207. The Manual has been cited by this Court in past cases interpreting the text of Annex I. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 438 n. 20 (1987)

mere window dressing. The listed principles, including those emphasizing equity, "constitute an integral part of the definitions as laid down in Parts I and II of this Annex." 62 Stat. 3051.

The definition of "refugee" at Part I, section A, and the definition of "displaced person" at Part I, section B, both apply to "victims of the Nazi or fascist regimes" and, therefore, generally describe the Jewish survivors of Nazi death camps. 62 Stat. 3051-52; IRO Manual, ch. III, pp. 14-15, 20-21, ch. XXIII, pp. 100-03. Part I, section A, paragraph 3 explicitly refers to certain "victims of Nazi persecution of Jewish origin," and Part I, section A, paragraph I(c) was crafted to encompass large numbers of Jews who had become refugees due to Nazi persecution before the outbreak of the second world war. 62 Stat. 3051-52; IRO Manual, ch. III, pp. 15-19; Holborn, *supra*, at 174-75. Further, the definition of "displaced person" includes a victim of the Nazi regime who, "has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as *persons who were compelled to undertake forced labour* or who were deported for racial, religious, or political reasons." 62 Stat. at 3051–52 (emphasis added); IRO Manual, ch. III, pp. 20-21. The text of the Annex not only identifies Jewish concentration camp survivors as war victims in general terms, but further specifies that the labor Nazis forced them to perform in the camps was integral to the persecution they suffered and could itself qualify them as "displaced persons."

A person meeting the definition of "refugee" or "displaced person" could never be "of concern" to the IRO if he also fell within any of the categorical grounds of exclusion at Part II of the Annex. The first two of these grounds were:

> 1. War criminals, quislings, and traitors.
>
> 2. Any other persons who can be shown:
>
> > (a) To have assisted the enemy in persecuting civil populations of countries, members of the United Nations; or
> >
> > (b) to have voluntarily assisted the enemy forces since the outbreak of the Second World War in their operations against the United Nations.[1]

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[1] Mere continuance of normal and peaceful duties, not performed with the specific purpose of aiding the enemy against the Allies or against the civil population of a territory in enemy occupation, shall not be considered to constitute "voluntary assistance." Nor shall acts of general humanity, such as care of wounded or dying, be so considered

> except in cases where help of this nature given to enemy nationals could equally well have been given to Allied nationals and was purposely withheld.

62 Stat. 3037, 3051-52 (footnote in original). The categorical exclusions of Part II must be read in light of the rest of the Annex, including the various provisions discussed above. These establish that (1) all terms of the Annex including the phrase "assisted the enemy in persecuting civil populations" were construed equitably so to assure just outcomes in particular cases; (2) the overall purpose of the Annex was to separate innocent war victims from guilty war criminals; (3) Jewish concentration camp survivors were war victims in both general and specific terms; and (4) the labor Jewish victims were forced to provide in concentration camps was an important aspect of their persecution that could qualify them for IRO protection. Taken together, these aspects of the Annex text give rise to the heavy presumption that the forced labor of Jewish concentration camp victims was *not* assistance to Nazi persecution. The equitable terms of the Annex rule out a strict-liability interpretation of Part II, Section 2(a), and so the question of whether a particular Jewish concentration camp prisoner had "assisted" Nazi persecution, if it ever arose[4], could

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[4] The text of Part II, sections 1 and 2(a), and especially the IRO Manual, cast serious doubt upon whether the exclusion at section 2 for "other persons who can be shown ... to have assisted the enemy in persecuting civil populations" was ever applicable to the conduct of camp inmates in the way

Fedorenko presumed. Section 1 excludes "war criminals, quislings, and traitors," and the words "other persons who . . . assisted the enemy" that immediately follow also appear to target persons whose conduct would be prosecuted as war crimes. The IRO Manual confirms this in its notably brief commentary to section 2(a):

> 17. The guiding rules laid down in respect of war criminals apply also to the above; their names are usually included in the United Nations War Crimes Commission's lists.

IRO Manual, ch. 6, p. 33. The Manual goes on to instruct Eligibility Officers, when credible evidence of guilt of persecution is presented, to withhold determination and consult with higher authorities. *Id.* The Eligibility Officer was not himself vested with the authority to make a determination of whether the applicant was a war criminal, quisling or traitor subject to the exclusion clause. *Id.* Presumably, the credible evidence in the Eligibility Officer's possession, once conveyed to higher authorities with the resources sufficient for a criminal investigation, could then be investigated and, if charges were lodged, a determination of ineligibility for protection could be made. *Id.*

The Manual elsewhere discusses the arguably persecutory conduct that certain Jewish concentration camp prisoners engaged in to maintain discipline for the Nazis:

> [T]he prisoners were selected to keep "discipline and order" and frequently they committed more atrocities than the S.S. Guards in the camp. The commonest type of disciplinary office holders in the camps were the professional criminals . . . [I]n each camp there was a camp senior or Lageralteste (or Capo) responsible to the S.S. for the discipline of the camp.

IRO Manual, ch. XXIII, pp. 101-02. The Manual's characterization of the Capos' conduct is highly controversial. *See Fedorenko*, 449 U.S. 532 n. 2 (Stevens, J., dissenting).

not be resolved merely by reference to the "objective effects" of his forced labor.

The footnote to Part II, Section 2, is somewhat ambiguous, but at a minimum it reinforces the important general principle that the entire Annex text must be applied in a just and equitable manner.[5] While the note refers to "voluntary assistance," not simply "assistance," it nonetheless shades the meaning of both subsections 2(a) and 2(b), because only subsection 2(a) refers to "civil populations." The important implication here is that voluntariness and subjective purpose are generally relevant to the concept of assistance. Therefore, the most logical reading of 2(a) in light of 2(b) *and* the footnote *and* the rest of the Annex is that while 2(a) has no

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Putting this controversy aside, what is striking is that the IRO Manual does not discuss the Capos' allegedly complicit and persecutory conduct in relation to Part II of the Annex at all, but instead in commentary to Part I, where their status as "victims of the Nazi or Fascist regimes" is called into question. IRO Manual, ch. III, p. 14. This is even stronger evidence that Part II, section 2(a) only applied to persons who would be prosecuted for war crimes, while the question whether a prisoner's conduct in the camps might disqualify him from IRO assistance turned separately upon his status as a "genuine, *bona fide*, and deserving" victim of persecution under Part I. IRO Manual, ch. II, p. 8.

[5] The meaning of the footnote and its relevance to *Fedorenko* is discussed in Stephen J. Massey's *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97, 113-119 (1986), and Abbe L. Dienstag's comment, *Fedorenko v. United States: War Crimes, the Defense of Duress, and American Nationality Law*, 82 Colum. L. Rev. 120, 131 n. 39 (1982).

voluntariness *requirement*, as 2(b) plainly does, the term "assisted" appearing at 2(a) must be construed in the same equitable manner as in 2(b), so that evidence of voluntariness and subjective purpose remain *relevant* to the determination of whether an individual's conduct "assisted" the persecution of civilian populations. This reading best harmonizes the various elements of the Annex with its stated purpose.

The above also squares with the common definition of "persecution," it being "the action of pursuing or persecuting a person or group with hostile intent." *Oxford English Dictionary* (2nd ed. 1989); *see also* Petitioner's Brief at 23. Pairing "persecution" with "enemy" in section 2(a) naturally leads one to presume that *all* persons who "assisted the enemy in persecuting civil populations" did so with a meaningful degree of freedom and shared persecutory purpose, thus making it unnecessary to add the qualifier "voluntarily" to "assisted." At the same time, there was good reason to leave the word "voluntarily" out of Section 2(a) because it is overbroad. Including it would have given many persons conscripted by the Nazis but who later furthered Nazi persecution with a meaningful degree of freedom and shared persecutory purpose the chance to assert a blanket defense that because they had not *volunteered* for service in the first instance all of their later conduct on behalf of the Nazis was involuntary. Leaving the term "voluntarily" out of 2(a) advanced the important principle that responsibility for persecution should be assigned based upon evidence of *individual moral culpability*,

and cannot be avoided because one was "just following orders." It makes sense that the IRO constitution's test for measuring assistance to persecution would mirror the famous standard applied to Nazi collaborators at the Nuremberg trials, a standard that also turned on the question of "moral choice."[6]

Congress later superimposed additional eligibility criteria on the "displaced person" definition it adopted from the IRO constitution, but none of these DPA provisions defining "eligible displaced persons" altered the Act's commitment to the underlying IRO scheme for measuring assistance to persecution. The congressional record documents an extensive, heated debate over competing DPA bills[7], but at no point did legislators in the House or Senate ever discuss the specific text of Annex I, Part II or otherwise address the concept of assistance to

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[6] "Principle IV: The fact that a person acted pursuant to order of his government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission of the United Nations, 1950.

[7] 94 Cong. Rec. H7727-76 (daily ed. June 10, 1948), H7860-65 (daily ed. June 11, 1948); H8854-63 (daily ed. June 18, 1948; 94 Cong. Rec. S6177-90 (daily ed. May 20, 1948), S6397-407 (daily ed. May 25, 1948); S6444-458 (daily ed. May 26, 1948); S6551-6587 (daily ed. May 27, 1948); S6669-6813 (daily ed. June 1, 1948); S6858-6917 (daily ed. June 2, 1948); S8079-9023 (daily ed. June 19, 1948).

persecution.[8] At several points during debate various legislators expressed their understanding that persons who provided forced labor in Nazi concentration camps would be eligible for visas under the Act. 94 Cong. Rec. S6452 (daily ed. May 26, 1948), S6866 (daily ed. June 2, 1948); 94 Cong. Rec. H7738 (daily ed. June 10, 1948).

The DPA's origins establish that Congress never intended the statute to measure visa eligibility based upon the "objective effects" of an applicant's conduct. Congress instead adopted a definition of assistance that turned on "moral choice." A careful reading of *Fedorenko* reveals that this Court, like Congress, also understood assistance to require individual moral culpability.

III. *FEDORENKO* DID NOT APPLY AN OBJECTIVE EFFECTS STANDARD.

The pertinent DPA provisions do not support the Fifth Circuit's "objective effects" test, and *Fedorenko*—the purported basis for the Fifth Circuit's test—provides no support for the standard, either.

The phrase "objective effects" is found nowhere in *Fedorenko*. It first appeared in the Board of Immigration Appeals (BIA) decision *In re Laipenieks*, 18 I & N Dec. 433, 465 (BIA 1983). *Laipenieks* was not a DPA case, but instead concerned whether a former member of the Nazi-

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[8] *Id.*; *see* Massey, 71 Minn. L. Rev. at 112-17.

controlled Latvian Political Police was deportable for having "ordered, incited, assisted or otherwise participated in the persecution of any person" under the 1978 Holtzman Amendment, 8 U.S.C. § 1251(a)(19). *Id.* at 463-66. In finding Laipenieks deportable, the BIA held that *Fedorenko* governed the term "assisted" in the new Nazi deportation statute and focused on footnote 34 of Justice Marshall's opinion. *Id* at 464. The BIA rejected as irrelevant Laipenieks's claim that he shared no persecutory motives with the Nazis, pointing to the phrase in the footnote that called for analysis, "*focusing on whether particular conduct can be considered assisting in the persecution of others.*" *Id.* at 464 (emphasis in original) (quoting *Fedorenko*, 449 U.S. at 512 n. 34. (emphasis added by *Laipenieks*)). The BIA italicized this entire phrase, while in the original text of the footnote this Court only emphasized the word "*persecution.*" *Id.* Reading the italicized phrase in isolation, the BIA concluded, "we look not to the respondent's subjective intent, but, rather, to the *objective effect* of his action in deciding whether he assisted in the specified persecution." 18 I & N Dec. at 465 (emphasis in original).

The following year the BIA used *Laipenieks* to affirm the deportation of Fedorenko, whose case had been remanded after the Supreme Court upheld his denaturalization. *In re Fedorenko*, 19 I & N Dec. 57, 69-70 (BIA 1984). Four more years later, the BIA imported its objective effects standard into the separate persecutor bars for asylum, 8 U.S.C. § 1101(a)(42), and withholding of deportation, 8 U.S.C.

§ 1253(h)(2)(A). *In re Rodriguez-Majano*, 19 I & N Dec. 811, 814-15 (BIA 1988). In doing so, the Board clarified the radically narrow scope of its standard, citing *Fedorenko* for the proposition that, "participation or assistance of an alien in persecution need not be *of his own volition* to bar him from relief." *Id* at 814 (emphasis added) (citing *Fedorenko*, 449 U.S. 490). It is this same standard that the BIA has applied since 1988, and that the Fifth Circuit followed below when it held, "[t]he question of whether an alien was compelled to assist authorities is irrelevant, as is the question whether the alien shared the authorities' intentions." *Negusie v. Gonzales*, 231 Fed. Appx. 325, 326 (5th Cir. May 15, 2007) (applying *Bah v. Ashcroft*, 341 F.3d 348, 351 (5th Cir. 2003).)

A. The Objective Effects Test Is Premised upon Fundamental Errors of Logic and Interpretation.

The objective effects standard stems from two related errors, the first logical and the second interpretative. *Fedorenko* reasoned that the absence of the term "voluntarily" in the DPA provision excluding those who "assisted the enemy in persecuting civilian populations" and its presence in the twin provision excluding persons who "voluntarily assisted the enemy forces" was clear evidence of congressional intent. 449 U.S. at 512. This Court explained that it would violate basic rules of statutory interpretation to read the first provision "to include a voluntariness requirement that the statute itself does not impose." *Id.* at 512 n.

34. But the fact that voluntariness is not a *requirement* of the first provision does not mean that voluntariness is *necessarily irrelevant* to whether an individual assisted persecution, and much less does it mean that subjective intent must also be irrelevant. This unwarranted leap of reason is the foundation of the objective effects test. *See Laipenieks*, 18 I & N Dec. at 465.

The BIA's logical error then caused the agency to adopt a flawed interpretation of *Fedorenko* at odds with the common meaning of the words "persecution" and "assisting." As Petitioner points out in his brief, Pet.'s Br. at 23, and as amicus noted above, *supra* at 17, the common definition of "persecution" presumes an actor possessing both the agency and purpose to pursue another person. Paired with "persecution" the word "assisting" is most naturally understood to mean conduct performed with a shared persecutory purpose and at least some meaningful degree of freedom. The BIA's notion of "assisting persecution" without intent or volition does not correspond to the ordinary use of those words.

So even when read in isolation, Justice Marshall's call for analysis "focusing on whether particular conduct can be considered assisting in the *persecution* of others" is best understood to describe an inquiry that considers both (1) whether acts of persecution were committed, and, if they were, (2) whether the "particular conduct" of the individual in question was culpable to the degree that he could fairly be deemed to have assisted. The second step of

this inquiry naturally looks to evidence of the individual's subjective intent and the degree to which one's conduct was voluntary—just the opposite of the objective effects test. A careful reading of *Fedorenko* reveals that this Court did in fact weigh evidence bearing on Fedor Fedorenko's intent and the voluntariness of his conduct.

B. In Concluding that Fedorenko Assisted Persecution, this Court Weighed Factors Having No Connection to the "Objective Effect" of his Conduct.

This Court's evaluation of Fedorenko's particular conduct was not limited to its objective effects. In concluding that Fedorenko assisted persecution, this Court noted that he "was issued a uniform and armed with a rifle and a pistol," that "he was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village," and that Fedorenko "admitted to shooting at escaping inmates on orders from the commandant of the camp." *Id.* at 514, n. 34.

It is true that Fedorenko's act of shooting at escaping prisoners and his act of patrolling the camp in uniform while armed had the objective effect of confining and terrorizing inmates. However, this Court did not limit its analysis to those *two* facts. To the contrary, this Court considered evidence that bore no relationship to the persecution suffered by the camp inmates, specifically noting that (1) Fedorenko was paid for his work, (2) he received a

merit stripe, (3) the Russian armed guards outnumbered the German soldiers at the camp, and (4) Fedorenko was able to leave the camp yet always returned. *Id.* Although these facts are objectively verifiable—and in that sense not wholly subjective—they are relevant in that they shed light on the nature of Fedorenko's personal motivation, the degree to which he became a meaningful member of the concentration camp staff, and the degree to which his actions were voluntary, even if he was forcibly recruited to serve as a guard in the first instance.

Under the fairest reading of *Fedorenko*, one must conclude that this Court was concerned not with the objective effects of Fedorenko's conduct, but with Fedorenko's personal *culpability*, which it ascertained by considering the entirety of Fedorenko's conduct and behavior under the circumstances, including evidence that his actions were voluntary to a meaningful degree

C. *Fedorenko* Does Not Hold that Voluntariness Is Irrelevant to Analyzing Assistance to Persecution.

The *Fedorenko* Court held that Fedorenko's "service as a concentration camp armed guard — whether voluntary or involuntary — made him ineligible for a visa." *Fedorenko*, 449 U.S. at 512. But this oft quoted language does not support the proposition that voluntariness is generally irrelevant when assessing whether particular conduct assisted

persecution. The words "whether voluntary or involuntary" are qualified by the equally important words "*service*," "*concentration camp*," and "*armed*." *Id.* Taken in the context of armed service, the term "voluntary" relates not to whether a concentration camp guard furnished a deadly weapon by his Nazi superiors was somehow compelled to perform his duties under immediate conditions of duress, but rather whether the initial decision to serve as a guard was voluntary. Thus, the Court's language actually reflects the view that, although Fedorenko may not have *volunteered* for his position at Treblinka, he and the other camp guards served the Nazis with a degree of freedom that made them personally culpable as assistants to persecution. When the Court used the term "voluntary," it was using it as a synonym for "enlisted" and, when the Court used the term "involuntary," it meant "conscripted" or "forcibly recruited."

It is otherwise clear that the Court did not intend to hold that voluntariness was generally irrelevant to the issue of assistance to persecution. The Court lifted its entire holding, including the clause "whether voluntary or involuntary," from its earlier description of Kempton Jenkins's expert testimony about how the DPA was administered by foreign service officers. *Id.* at 510. Jenkins testified that, based on his experience as a vice consul in Germany reviewing DPA visa applications, "[Fedorenko's] service as an armed guard at a concentration camp — whether voluntary or not — made him ineligible for a visa" under the DPA. *Id.* at 510-11. The Court's holding merely confirmed Jenkins's official

account and addressed the separate issue of whether concealing his service at Treblinka materially affected Fedorenko's original DPA application.

Read in light of Jenkins's testimony, *Fedorenko* more accurately held that regardless of whether one voluntarily enlisted or was forcibly recruited, an individual who thereafter served as an armed guard at a Nazi concentration camp "assisted" the persecution of civilians within the scope of DPA section 2(b) and was ineligible for a visa. The holding does not stand for the general proposition that evidence of voluntariness, motive, or subjective intent are necessarily irrelevant to determining whether an individual assisted persecution.

D. *Fedorenko*'s Culpability Standard Was not Elaborated on Because So Few Nazi Cases Presented Difficult Line-Drawing Problems.

For many years the BIA applied its misguided "objective effects" test in Nazi deportation and denaturalization cases, but its flaws did not produce unjust results because the government pursued Nazi persecutors or collaborators whose acts were clearly as culpable as Fedorenko's. Indeed, the facts of many of these cases were almost indistinguishable from *Fedorenko*. *See, e.g., Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999) (former Nazi willingly served as an armed SS guard at Auschwitz and Sachsenhausen concentration camps); *United States v. Breyer*, 41 F.3d 884, 886 (3d Cir. 1994) (former Nazi joined Waffen SS and served as armed guard at

Buchenwald and Auschwitz death camps); *United States v. Schmidt*, 923 F.2d 1253, 1255 (7th Cir. 1991) (Romanian inducted into German army served as armed concentration camp guard at Sachsenhausen); *Kulle v. INS*, 825 F.2d 1188, 1189 (7th Cir. 1987) (former Nazi joined Waffen SS and served as concentration camp guard and trainer, receiving promotions to ranks of corporal and sergeant); *Schellong v. INS*, 805 F.2d 655, 661 (7th Cir. 1986) (former Nazi joined SS and served as commander supervising guards at Sachenburg and Dachau concentration camps); *United States. v. Kairys*, 782 F.2d 1374, 1377 (7th Cir. 1986) (Lithuanian recruited by Nazis trained guards and served as guard at Treblinka concentration camp).

Even in slightly different circumstances, the outcomes were equally untroubling, since for the most part, the persecutor and the victims were clearly defined and the acts just as heinous. *See, e.g.*, *United States. v. Stelmokas*, 100 F.3d 302, 313 (3d Cir. 1996) (Lithuanian volunteered to serve in police unit organized by Germans to persecute Jews and was commander in guard unit confining Jews to ghetto where they were subjected to severe persecution); *United States v. Ciurinskas*, 148 F.3d 729, 731 (7th Cir. 1998) (Lithuanian soldier absorbed into German army served in special unit sent on missions to execute thousands of communists, Jews and others); *Kalejs v. INS*, 10 F.3d 441, 442 (7th Cir. 1993) (Latvian soldier joined and served as commander in pro-German military unit carrying out Nazi policy by executing thousands of Jews, Gypsies and others).

Until recently, courts have not had to face the "difficult line-drawing problems" that the *Fedorenko* Court anticipated could arise in other contexts.[9]

IV. THIS COURT SHOULD REJECT THE "OBJECTIVE EFFECTS" TEST.

It is highly questionable whether *Fedorenko* is applicable in the separate statutory context of asylum claims. *See* Petitioner's Brief at I, B. But should this Court determine that *Fedorenko* is relevant to the application of the asylum statute, it should reject the Fifth Circuit's objective effects test. By adopting a narrow view of *Fedorenko* and refusing to consider evidence of individual culpability, the Fifth Circuit permits unjust, inequitable results in hard cases and exhibits a disturbing indifference toward the victims of persecution our asylum laws were meant to protect. It is all the more troublesome that the Fifth Circuit should derive its standard from a case concerning victims of the Nazi death camps, as it treats both deserving asylum seekers and holocaust survivors as morally indistinguishable from their persecutors.

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[9] A very small number of Nazi persecution cases have presented conduct that was less obviously culpable. *See, e.g.*, *Petkiewytsch v. INS*, 945 F.2d 871, 880-81 (6th Cir. 1991); *United States v. Kowalchuk*, 773 F.2d 488, 511-12 (3rd Cir. 1985); *United States v. Sprogis*, 763 F.2d 115, 121 (2d Cir. 1985). The alien in each of these cases was slightly removed from the persecutory acts.

The Fifth Circuit's reading of *Fedorenko* cannot be squared with the text and purpose of the IRO constitutional provisions that Congress incorporated whole into the DPA. *Fedorenko* struck the balance dictated by the terms of the IRO constitution, denying those culpable of assisting the Nazis the technical defense that they had been conscripted and were just following orders, while also protecting demonstrably innocent victims whose forced labor helped drive the machinery of their own persecution. The *Fedorenko* Court understood that an inflexible test could never achieve this balance, and so it adopted a nuanced standard based on personal moral culpability that would allow courts to draw fair lines between persecutors and their victims.

Unlike Nazi denaturalization and deportation cases where courts had no reason to unpack the nuances of the *Fedorenko* test set out in footnote 34, asylum cases do present the difficult line drawing problems *Fedorenko* anticipated. To the extent this Court finds *Fedorenko* relevant in the asylum context, it should clarify the standard set forth in footnote 34 to allow consideration of voluntariness, subjective intent, and other important factors going to personal moral culpability.

A. Most Courts Applying *Fedorenko* in Asylum Cases Have Adopted a Personal Culpability Standard.

As courts have begun to grapple with applying *Fedorenko* to asylum and withholding of removal cases, nearly all have adopted some type of personal

culpability test, recognizing a broad array of circumstances—including voluntariness—as relevant to the analysis of whether particular conduct assisted persecution. The Eighth and Ninth Circuits have applied the broadest "personal culpability" standards, and other Circuits have done so to varying extents.

Over a decade ago, the Second Circuit reasoned that under *Fedorenko*, it seems "clear" that "personal culpability" is required for the denial of asylum on the ground of participation in persecution. *Ofosu*, 98 F.3d at 701. As that test has evolved, the Second Circuit has tended to look to the applicant's "behavior as a whole," including traditionally "subjective" factors. *See Gao v. U.S. Attorney General*, 500 F.3d 93, 99, 103 (2d Cir. 2007) (considering whether applicant had the requisite level of culpable knowledge that his acts would assist in persecution); *Xie v. INS*, 434 F.3d 136, 141, 144 (2d Cir. 2006) (assessing petitioner's voluntariness despite statutory language and "emphatically" leaving open possibility that redemptive behavior may be relevant to whether an applicant assisted in persecution).

The Eighth Circuit expressly adopted a personal culpability test in *Hernandez v. Reno*, 258 F.3d 806 (8th Cir. 2001). In *Hernandez*, the Eighth Circuit remanded, finding that the BIA had failed to engage in the "particularized evaluation" of the applicant's conduct required by *Fedorenko*. *Id.* at 813. When faced with hard line drawing problems—such as the Eighth Circuit faced there—*Fedorenko* required that

the IJ engage in a particularized evaluation to determine whether an individual's behavior was "culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution." *Id.*

In its view, such an evaluation necessarily included "all aspects of Hernandez's testimony," including his claim that the persecutory acts were involuntary. *See id.* at 813-14 (faulting BIA for failing to consider Hernandez's uncontroverted testimony that his involvement with the guerillas was at all times involuntary and compelled by threats of death). An analysis of Hernandez's mental state was not only consistent with, but in fact required by, what the Eighth Circuit called *Fedorenko's* "particularized evaluation" language.[10]

The Ninth Circuit in *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) and again in *Miranda-Alvarado v. Gonzales*, 449 F.3d 915, 926 (9th Cir. 2006) used *Fedorenko* to require immigration judges to conduct a "particularized evaluation" to assess an asylum applicant's "responsibility for persecution" and to evaluate an applicant's conduct along a "continuum" so as to determine "personal culpability." *Miranda-Alvarado*, 449 F.3d at 926; *Vukmirovic*, 362 F.3d at 1252-53; *see also Riad v. INS*, No. 96-70898, 1998 WL 559348, at *3, *5 (9th Cir. Sept. 1, 1998)

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[10] The Attorney General favorably cited *Hernandez* in *In re A.H.*, 23 I. & N. Dec. 774, 785 (A.G. 2005) without discussing the BIA's objective effects test. *See also* Petitioner's Brief at 49-50.

(requiring IJ to evaluate individual's "personal culpability" along a continuum of conduct to determine if he assisted in persecution). The Ninth Circuit identified two requirements to establish *Fedorenko* "culpability": personal involvement and purposeful assistance. *Miranda-Alvarado*, 449 F.3d at 927. The second requirement, purposeful assistance, factors in the totality of the surrounding circumstances, including the motivation behind the applicant's behavior. *See Miranda-Alvarado*, 449 F.3d at 927, n. 10 (questioning whether actions that result from physical or psychological compulsion or acts accompanied by frequent redemptive behavior could be sufficiently culpable to preclude asylum eligibility); *Vukmirovic*, 362 F.3d at 1252-25 (analyzing whether behavior was undertaken in self-defense).

According to the Ninth Circuit, part of analyzing an applicant's motivation involves assessing the extent to which persecutory behavior is involuntary and participation coerced. *See Miranda-Alvarado*, 449 F.3d at 929 (contemplating some situations so coercive that under a totality of the circumstances analysis, an individual could not be found to have assisted in persecution). In order to achieve a just result in difficult cases and to bar from entry into the United States only those truly "culpable" individuals, *Fedorenko requires* the court to consider voluntariness as part of the "particularized evaluation" of each applicant. *Id.*

Citing *Hernandez* and *Miranda-Alvarado*, the Eleventh Circuit recently adopted a version of the

Fedorenko culpability standard in the case of a Chinese asylum applicant who worked in a forced abortion clinic. *Chen v. U.S. Attorney General*, 513 F.3d 1255, 1259 (11th Cir. 2008). There, the Court held that the standard for determining whether an asylum applicant is ineligible for asylum and withholding of removal due to assistance or participation in persecution is a "particularized, fact-specific inquiry" into whether the applicant's personal conduct was merely indirect or peripheral or if the conduct was active, direct, and integral to the underlying persecution. *Id.* After considering a host of factors, including the voluntariness of the applicant's actions, the court determined that the applicant's conduct as a guard at the family planning facility where forced abortions were performed rose to the "level of culpability" that qualifies as assistance in persecution. *Id.* at 1260.

The Fourth Circuit has also implicitly adopted a personal culpability test. *See Higuit v. Gonzales*, 433 F.3d 417, 421 (4th Cir. 2006) (affirming IJ's decision that Higuit assisted in persecution because there was no dispute over his "personal culpability" in this case). As has the Seventh Circuit. *See Doe v. Gonzales*, 484 F.3d 445, 448 (7th Cir. 2007) (in evaluating whether applicant assisted persecution, considering circumstances under which he was came to engage in persecution and extent to which he understood mission); *Singh v. Gonzales*, 417 F.3d 736, 741 (7th Cir. 2005) (after considering a host of factors bearing both on persecutory acts and on the motivation behind them, considering whether

Singh's conduct was "the type that Congress intended to target" when using the term assisted).

The only Circuit that has outright rejected an evaluation of personal culpability in favor of the BIA's "objective effects" test in asylum and withholding of removal cases is the Fifth Circuit—the court from which Negusie has appealed. All of the other Circuits that have considered a voluntariness or duress defense have recognized that, in these difficult line-drawing cases where the persecutors and persecuted are not so easily identifiable, the persecutor bar must be flexible enough to account for the complex social and cultural dynamics of the modern day. The Fifth Circuit's outdated and unsupported "objective effects" test should be overturned.

B. These Cases Have Identified a Number of Recurring Factors Important to the Culpability Assessment.

The foregoing cases have identified a number of factors relevant to assessing an individual's personal culpability under the persecutor bar provisions. This Court should consider all of these factors in elaborating upon *Fedorenko's* "particularized evaluation" or "personal culpability" test.

Although not exhaustive, some recurring factors include the following:

(1) Voluntariness/duress, *Chen*, 513 F.3d at 1260; *Doe*, 484 F.3d at 448 (considering circumstances under which applicant was brought to assist in persecution); *Miranda-Alvarado*, 449 F.3d at 927 (evaluating extent of physical and psychological compulsion); *Xie*, 434 F.3d at 143 (weighing fact that Xie could quit job at any time); *Hernandez*, 258 F.3d at 813-14 (considering that applicant was forcibly recruited into the organization and supervised while performing persecutory acts);

(2) Shared persecutory motivation, *Miranda-Alvarado*, 449 F.3d at 927-29 (factoring in alien's position within persecutory organization and involvement in planning); *Singh*, 417 F.3d at 740 (weighing absence of acts of disobedience); *Hernandez*, 258 F.3d at 813-14 (considering how often applicant expressed disagreement with the persecutory acts even when closely supervised and under threat of death);

(3) Meaningful membership in persecuting organization, *Chen*, 513 F.3d at 1260 (considering whether applicant was paid for work and degree of involvement in acts); *Miranda-Alvarado*, 449 F.3d at 927-29 (considering length of time involved in persecutory acts); *Singh*, 417 F.3d at 740 (considering length of time involved in persecutory acts and degree of persecutor's remorse or disgust); *Hernandez*, 258 F.3d at 813-14 (considering length of time involved in persecutory acts and whether applicant received payment or reward for engaging in acts);

(4) Directness of involvement in acts of persecution, *Chen*, 513 F.3d at 1260; *Miranda-Alvarado*, 449 F.3d at 927-28; *Singh*, 417 F.3d at 740; *In re A.H.*, 23 I & N Dec. at 784.

(5) Knowledge, *Chen*, 513 F.3d at 1260; *Casteneda-Castillo v. Gonzales*, 488 F.3d 17, 21-22 (1st Cir. 2007); *Doe*, 484 F.3d at 448; *Xie*, 434 F.3d at 143; *In re A.H.*, 23 I & N Dec. at 785.

(6) Redemptive acts, *Chen*, 513 F.3d at 1260, n.4 (questioning whether redemptive acts were mitigating factor); *Doe*, 484 F.3d at 450-51 (considering relevance of redemptive acts); *Xie*, 434 F.3d at 142-43 (considering redemptive acts in light of risk involved to the applicant); *Hernandez*, 258 F.3d at 813-14 (evaluating applicant's attempts to avoid harming others); and

(7) Efforts undertaken to escape (or lack thereof), *Miranda-Alvarado*, 449 F.3d at 927-29; *Singh*, 417 F.3d at 740; *Hernandez*, 258 F.3d at 813-14;

A "personal culpability" test that considers these factors is not only consistent with, but required by *Fedorenko*. Footnote 34 demonstrates that the *Fedorenko* Court did not intend to deny immigration relief to otherwise innocent victims, but rather to devise a workable legal framework to protect them. As demonstrated by the approach taken by many Circuit Courts, *Fedorenko* provides the analytical flexibility to adapt to present circumstances. Analyzing a multitude of factors, instead of focusing solely on "objective effects," has enabled courts to

award relief in an equitable way that honors the letter and spirit of our asylum laws. This Court should reject the Fifth Circuit's rigid test in favor of a flexible framework that will allow courts to equitably rule in asylum cases when faced with nuanced facts where the distinction between persecutor and victim is not always clear.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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June 2008

AMICUS CURIAE BRIEF

95

No. 07-499

(4)

IN THE

Supreme Court of the United States

FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DANIEL GIRMAI NEGUSIE,

Petitioner,

—v.—

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Decades after the now expired 1948 Displaced Persons Act (DPA) prohibited the issuance of a visa to an alien who "assisted the enemy in persecuting civil populations of countries, Members of the United Nations" or "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations", the Refugee Act of 1980 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the Immigration and Nationality Act (INA) to prohibit the granting of asylum to, or the withholding of removal of, an alien who "ordered, incited, assisted, or otherwise participated in the persecution" of others based on their "race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A); INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).

The question presented is whether the voluntariness of an alien's service as an armed guard of persecuted prisoners, deemed by this Court in 1981 to be irrelevant to visa eligibility under the DPA, is, in contrast, relevant to asylum or withholding under the INA.

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INTEREST OF THE AMICI CURIAE[1]

The American Jewish Congress

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. It has a long history of combating anti-Semitism both in the United States and abroad, and, specifically, has encouraged the prosecution of denaturalization cases against alleged Nazi war criminals to provide assurances that such criminals do not find a haven in this country.

The Court of Appeals for the Fifth Circuit relied on *Fedorenko v. United States*, 449 U.S. 490 (1981), which resulted in the denaturalization of an alleged Nazi war criminal, to deny asylum and withholding to the Petitioner in the instant case. The American Jewish Congress has an interest in seeing that the decision in *Fedorenko* (in which it filed an *amicus* brief) retains its meaningfulness and applicability to questions of immigration law and not become a misapplied mechanism for excluding all aliens who, forced under threat of death or torture to assist in

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[1] The parties have consented to the filing of this brief, and their written letters of consent accompany it for filing with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

violence, seek refuge in this country from that violence.

The American Jewish Committee

The American Jewish Committee, a not-for-profit human relations organization of approximately 175,000 members and supporters and 32 regional chapters, was founded in 1906 to combat anti-Semitism and other forms of bigotry and promote human rights for all. Out of a determination that the perpetrators of the Nazi Holocaust not find safe haven in the United States, the American Jewish Committee has supported efforts to bring them to justice. At the same time, out of a deep commitment to humanitarian refugee policy, and a recognition that both the law and the historical context have changed since the post-World War II era, the American Jewish Committee believes that an inquiry into culpability is warranted where, as here, an asylum seeker credibly alleges to have acted under threat of torture or death. If found not culpable, such a refugee should not be precluded from a grant of asylum.

SUMMARY OF THE ARGUMENT

The Substantive Issue in Perspective

In *Fedorenko, supra,* the American Jewish Congress and the American Jewish Committee urged that where an applicant for admission to the United States, under the former Displaced Persons Act, 62 Stat. 1009 (1948) ("DPA"), had lied or willfully concealed facts (his service as a concentration camp guard), which facts, if disclosed, would have been helpful in an investigation that might lead to exclusion, such lies or concealment themselves justified exclusion. *See* 1980 WL 339961 at *9 (U.S. July 18, 1980) (brief *amicus curiae* of the American Jewish Congress); 1980 WL 339962 at *11 (U.S. July 24, 1980) (brief *amicus curiae* of the American Jewish Committee). The briefs *amici curiae* did not reach the issue of whether an applicant had acted voluntarily or under duress. *Id.*

This Court, however, did reach the issue, and determined that whether an applicant in that petitioner's situation had acted voluntarily or under duress was irrelevant. *Fedorenko* 449 U.S. at 509. However, in a footnote, the Court recognized that the nature of the applicant's acts could in "[o]ther cases" become pertinent:

> The solution to the problem perceived by the District Court . . . lies not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether the particular conduct can be considered assisting in

> the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id. at 514, n. 34 (emphasis in original). In sum, under the DPA, the voluntariness of conduct was not specifically at issue because it was the overall inherent nature of the conduct that was germane.

This proceeding, however, applies law that is newer than the DPA, and does address the issue of voluntariness. Currently applicable law requires a court to decide whether acts committed under compulsion or duress amount to preclusive conduct. Consider the following now familiar scenario: human shields, behind whose protective cover terrorists lurk until ready to kill or maim, assist persecutors by providing cover, whether by opening their homes as camouflage for missile batteries or providing a human phalanx. If they seek asylum in this country, are they persons "who assisted in the persecution" of

civilians? Does it matter whether they were acting under duress or were part and parcel of the terrorist plot? The *amici* here say that it does matter.[2] Under currently applicable law, the court is bound to determine their culpability. Concisely put, culpability for persecutory conduct is the standard under the current statutory scheme.

The Statutory Scheme

In 1946, in response to the massive and immediate refugee problem in Europe created by World War II, the Constitution of the International Refugee Organization was presented for signature by the member states of the United Nations. *Opened for signature* Dec. 15, 1946, 62 Stat. 3027, T.I.A.S.

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[2] The concept of culpability as the essential predicate for punishment is firmly rooted in Judeo-Christian teachings. The book of *Deuteronomy* states that "If a damsel that is a virgin be betrothed unto an husband, and a man find her in the city and lie with her; Then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die . . . But if a man find a betrothed damsel in the field, and the man force her, and lie with her: then the man only that lay with her shall die: But unto the damsel thou shalt do nothing; there is in the damsel no sin worthy of death . . . For he found her in the field, and the betrothed damsel cried, and there was none to save her." *Deuteronomy* 22:23-27 (King James). Thus, the attacker alone would be punished where he forced his partner into sin. The twelfth century biblical scholar, Moses Maimonides, emphasizes the essential distinction as being one of culpability, and concludes that this biblical stricture teaches that, where a person forces another "to commit a sin by threatening to kill him if he doesn't, then he should commit the sin in order not to be killed." Moses Maimonides, *Law of Fundamentals of the Torah*, Chapter 5, *available at* http://www.panix.com/~jjbaker/MadaYHT.html.

No. 1846 (1948) ("IRO Constitution"). The IRO Constitution, which created the precursor agency to today's Office of the United Nations High Commissioner for Refugees ("UNHCR"), sought to assist in the resettlement and repatriation of European refugees. In so doing, the IRO Constitution introduced a definition of the term "refugee" that was specific to the immediate refugee problem and was entirely influenced by the recent war. It endeavored both to assist victims of the conflict and to exclude from its assistance wartime enemies of the Allied Forces. That Constitution thus drew a distinction between "bona fide refugees and displaced persons" on the one hand, and, on the other hand, "war criminals, quislings and traitors [and] any other persons who . . . assisted the enemy in persecuting civil populations . . . or . . . voluntarily assisted the enemy forces . . . against the United Nations". IRO Constitution, Annex 1, Pt. I, § A and Pt. II.

The IRO Constitution's definition of refugees and displaced persons was adopted, by reference, into the 1948 DPA, a law passed by Congress to facilitate the absorption into, as well as exclusion from, the United States of certain European refugees. 62 Stat. 1009. The DPA is also the law which this Court applied in 1981 to affirm the denaturalization of a former Nazi concentration camp guard who had lied about his past in order to skirt the DPA's restrictions. *See Fedorenko*, 449 U.S. at 496-97, 507, 513-14.

The DPA expired in 1954, and it does not apply to Petitioner Negusie, a stowaway who reached this country in 2004. The Court of Appeals for the Fifth

Circuit, in citing *Fedorenko* in its interpretation of the DPA to support the denial of Mr. Negusie's asylum and withholding of removal claims, ignores this important detail. *Negusie v. Gonzales*, 231 Fed. Appx. 325, 326 (5th Cir. 2007). In fact, here, a different law applies, namely, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*

Like the DPA, the INA is affected by the IRO Constitution's definition of "refugee," but far less directly. The "refugee" definition from the IRO Constitution influenced, and provided a baseline for, the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Refugee Convention"). *Done* July 28, 1951, 189 U.N.T.S. 150. The 1951 Refugee Convention, in turn, was the original source of the meaning of "refugee" that currently appears in the INA. *See* S. Rep. No. 96-256, at 4 (1979), *reprinted in* 1980 U.S.S.C.A.N. 141, 144. But that is significantly different from the DPA's wholesale adoption of the IRO Constitution's refugee definition.

Even though the DPA and the INA both incorporate and use the term "refugee" based on language that originated in a document drafted in 1946, the now-defunct DPA simply adopted that language verbatim, while the still-current INA uses significantly different words—words that were added to it via the 1980 Refugee Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and that were informed not just by the 1951 Refugee Convention, but also by the evolving international and humanitarian obligations of the United States over the second half of the twentieth century to open its borders to refugees and

to aid the world in easing refugees' plight. *See* Refugee Act of 1980, P.L. 96-212, 94 Stat. 102, § 101 ("Purpose") (96th Cong. 1980). The purpose of those added words was to "bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968 [the "1967 Refugee Protocol"], and the [1951 Refugee Convention] which is incorporated by reference into United States law through the Protocol." S. Rep. No. 96-256, at 4; *accord,* S. Rep. No. 96-590, at 20 (1980) (noting that the definition of refugee was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."); *see also* H.R. Rep. No. 96-608, at 9 (1979).

The "conformity with our international treaty obligations" imposed by the 1967 Refugee Protocol and the 1951 Refugee Convention requires, when determining whether an alien may fairly be called a refugee, the application of standards of criminal culpability. *See* Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) ("Handbook") ¶¶ 147-150, 162 ("it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature").

Thus, the 1948 DPA, which was actually passed two months *before* the formal entry into force of the IRO Constitution from which its use of "refugee" was derived, was a quick reaction to an immediate post-

World War II crisis that combined the humanitarian need for easing the burden posed by over a million European refugees with a desire for retribution against recently vanquished aggressors. It reflected an understandably cautious approach to the admission of aliens into this country, and was particularly concerned with ensuring this country's aid and protection did not extend to its recently defeated enemies or their sympathizers. By contrast, the INA, through its numerous and substantial amendments over the years, is not bottomed upon a need to exact retributive justice, but has come to be a durable and widely applicable expression of a generous policy of admission.

Seen in this historic context, the difference in the way the DPA and the INA deal with "refugees" is not merely semantic, but is substantive. When the DPA excluded from its protection aliens who "assisted the enemy in persecuting civil populations of countries, Members of the United Nations" it was intended, as established by reliable expert testimony in *Fedorenko*, to exclude even those armed guards who claimed they were forced involuntarily into service. *See Fedorenko*, 449 U.S. at 499 n. 14, 510 n. 32. By contrast, when the INA excludes from its protection aliens who "ordered, incited, assisted, or otherwise participated in the persecution" of others, INA §§ 101(a)(42), 208(b)(2)(A)(i), 241(b)(3)(B)(i); 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i), it means those who did so with criminal culpability sufficient to warrant denial of the protection of the international community as expressed in the 1951 Refugee Convention and the 1967 Refugee Protocol. *See* S. Rep. No. 96-590, at 20; Handbook, at ¶¶ 150,

162. Whether an alien asylee possesses such culpability must therefore be determined by the fact finder before asylum or withholding of removal can be denied on the basis that the alien was a persecutor. It is this determination that the Court of Appeals for the Fifth Circuit dispensed with. It must be made, on remand.

ARGUMENT

POINT I The Legislative History Makes Clear That While the DPA Was Intended To Exclude Any Enemy Persecutor, the INA Excludes Only Those Who Are Criminally Culpable

A. The DPA Was a Remedy Specific to the Consequences of World War II

The DPA provisions that dictated which aliens would not benefit from its protections are not useful for interpreting similar provisions of the INA because the respective provisions serve different purposes.

1. The DPA Was a Response to an Urgent Need for Resettlement of Over One Million European Refugees

The DPA was passed in 1948 to "authorize for a limited period of time the admission into the United States of certain European displaced persons". 62 Stat. 1009, Preamble. At that time, over one million refugees were living in displaced person camps throughout Europe, unwilling or unable to resettle in their home countries. The DPA's provisions do not address a timeless, global humanitarian issue, but instead refer explicitly to particular groups of victims of the Second World War, including victims of the Nazi regime, victims of the Fascist regime in Spain, and German or Austrian Jews, persecuted by the Nazis, who remained unsettled. In choosing these groups for special protection, Congress merely copied their descriptions wholesale from the Constitution of the IRO, a document that the United States had

approved in 1947, but which would not even be entered into force (following its acceptance by at least fifteen nations) until August of 1948, two months after the DPA became law. *Compare* DPA, 62 Stat. 1009 (approved June 25, 1948) *with* IRO Constitution, 62 Stat. 3037 (entered into force Aug. 20, 1948). Pursuant to the DPA,

> "Displaced Person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

62 Stat. at 1009. Annex I of the IRO Constitution, in turn, defined a refugee or a displaced person as follows:

> the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:
>
> (a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
>
> (b) Spanish Republicans and other victims of the Falangist regime in

Spain, whether enjoying international status as refugees or not;

* * *

[T]he term "refugee" also applies to a person ... who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.

* * *

[T]he term "refugee" also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.

* * *

The term "displaced person" applies to a person who, as a result of the actions of the authorities of the regimes mentioned in Part I, section A, paragraph 1 (a) of this Annex has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to

> undertake forced labour or who were deported for racial, religious or political reasons.

IRO Constitution, Annex I, Pt. I, §§ A, B. Thus the DPA (via the IRO Constitution definitions) focused specifically on refugees victimized by the Second World War. *Id.*[3]

Further, the DPA applied strict quotas on aliens based on ethnicity and nationality, reflecting the remnants of pre-war bias against certain types of immigrants, and demonstrating that the DPA was a cautious and narrow solution to the pressing refugee problem, not to a more universal issue. *See* DPA §§ 3, 5, 6. The DPA, like its international companion, sought to resolve an immediate crisis, and to do so "in the shortest possible time". IRO Constitution, Preamble.

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[3] Classic cases of "displaced" persons within the intendment of the IRO Constitution were the legions who had been deported from Poland to perform forced labor in Austria and Germany and who, at war's end, could not find either the strength or the means to return to shattered homes and who for seemingly interminable periods languished in "DP Camps," joining the human wreckage that had emerged from Mauthausen, Auschwitz and other testimonials to man's inhumanity to man. *See* Robert Knight, *Restitution and Legitimacy in Post-War Austria, 1945-1953*, Leo Baeck Institute Yearbook (1991); Michael Burri, *Postwar Contexts and the Literary Legacy of Forced Labor In Austria*, 93 New German Critique 103 (2004).

2. The DPA Explicitly Withheld its Protection from World War II War Criminals, Quislings, Traitors, and Those Who Assisted the Enemy

At the same time, the United States had only just completed its sacrifice of almost half a million lives to the war, *see* Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500-2000* (2d ed. 2002), and, like others in the United Nations, was not eager to aid and protect those who had caused the loss. *See* Handbook, ¶ 148 (noting agreement that war criminals should not be protected). This sentiment was expressed in the international resolution that initiated the IRO's creation:

> no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors . . . .

IRO Constitution, Annex III, ¶ (d). Accordingly, the DPA, again by adoption of the IRO Constitution's definition, did not protect specific people:

> 1. War criminals, quislings and traitors.
> 2. Any other persons who can be shown:
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
> (b) to have voluntarily assisted the enemy forces since the outbreak of the

> second world war in their operations against the United Nations.

IRO Constitution, Annex 1, Pt. II. Thus, special care was taken to exclude from the umbrella of protection designed for refugees certain categories of persons – war criminals, quislings,[4] and traitors – who had opposed the Allies, without regard to whether that opposition was coerced or voluntary. Similarly, even without having done so "voluntarily," a person otherwise considered a refugee who assisted the enemy in persecution was denied the DPA's protections. *Id.* In this way, Congress expressed a clear distinction not between refugees and criminal refugees, but between refugees and enemy refugees. DPA § 2.

B. The INA, as Amended in 1980 and 1996, Reflects a Permanent, Global, and Humanitarian Commitment to Assist Refugees

In contrast to the DPA, the relevant INA provisions do not make any reference to "the enemy." *See generally* INA §§ 101(a)(42), 208(b), 241(b)(3), 8 U.S.C. §§ 1101(a)(42), 1158(b), 1231(b)(3). The provisions at issue here were added to the INA by the 1980 Refugee Act, P.L. 96-212, 94 Stat. 102 (96th Cong. 1980), and the 1996 IIRIRA, P.L. 104-208, 110

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[4] A quisling – a traitor or collaborationist, most commonly used to refer to members of fascist political parties or military or paramilitary forces in occupied Allied countries who collaborated with Axis occupiers – is a term named after Norwegian politician Vidkun Quisling, who assisted Nazi Germany in conquering his own country. *See The Columbia Encyclopedia* 2263 (5th ed. Columbia Univ. Press 1993).

Stat. 3009-546 (104th Cong. 1997). Those two acts amended the INA to improve this country's ability to handle its alien refugees, and the changes made reflect that purpose.

The 1980 Refugee Act modified the definition of "refugee" in INA Section 101 to exclude those who engaged in persecution, so as to remain consistent with the 1951 Refugee Convention and the 1967 Refugee Protocol (*see* H.R. Rep. No. 96-608, at 10), which the United States had committed, in 1968, to following. *See* 1967 Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 267. Indeed, as this Court has observed, "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with" the 1967 Refugee Protocol. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Further, the 1980 Refugee Act was designed to broaden the scope of refugees admitted from the far narrower one imposed immediately after World War II. In hearings on the act, former Senator Dick Clark, the appointed United States Coordinator for Refugee Affairs, testified that the then-existing legislative framework "was originally designed to deal with people fleeing Communist regimes in Eastern Europe or repressive governments in the Middle East in the immediate post-war period and the early cold war years." *The Refugee Act of 1979:* Hearings before U.S. Senate Committee on the Judiciary, 96th Cong. 9 (Mar. 14, 1979). He stated that such a framework was "inadequate to cope with the refugee problem we face today." *Id.*

Like the 1980 Refugee Act, the 1996 IIRIRA and the 1995 I.N.S. administrative reforms prior to the IIRIRA's enactment were also consistent with the 1951 Refugee Convention. They were designed to streamline the asylum system and to thwart those aliens who, temporarily released into the United States with a scheduled asylum hearing date, would illegally remain without appearing for their hearing. *See Asylum and Inspections Reform:* Hearings before Subcomm. on Int'l Law, Immigration, and Refugees, of the Comm. on the Judiciary, 103d Cong. 2-3 (Apr. 27, 1993) (statement of chair and H.R. 1679 sponsor Rep. Romano L. Mazzoli). The IIRIRA reemphasized the persecution exclusion, already embodied in the definition of "refugee," by redundantly adding it as an exception to the INA sections on asylum (INA § 208, 8 U.S.C. § 1158) and withholding of removal (INA § 241, 8 U.S.C. § 1231). *See* H.R. Res. 1679, 103d Cong. §§ 2, 4 (1993).

Thus, by amending the INA, both the 1980 and 1996 acts codified the obligations that the United States had years earlier undertaken, when it acceded to the 1951 Refugee Convention (via the 1967 Refugee Protocol).

The 1951 Refugee Convention was in important ways a departure from the IRO Constitution and similar international agreements. For instance, "[w]hile earlier international instruments only applied to specific groups of refugees, the definition of the term 'refugee' contained in Art. I of the 1951 [Refugee] Convention is couched in general terms." UNHCR, *Introductory Note* to the Convention and Protocol relating to the Status of Refugees (Geneva,

Aug. 2007). Indeed, ethnicity and nationality-based quotas employed by the DPA, and still used by the I.N.S. after 1951, were eliminated by the 1980 Refugee Act, which instead mandated broader overall ceilings on numbers of immigrants.

The 1951 Refugee Convention sought not only to apply to all refugees globally, but to broaden overall the protections provided by previous agreements. *See* United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 37 (Feb. 17, 1950) (U.N. Doc. E/1618, E/AC.32/5) ("In drafting this convention, the Committee gave careful consideration to the provisions of previous international agreements. It sought . . . to assure that the new consolidated convention should afford *at least* as much protection to refugees as had been provided by previous agreements.") (emphasis added). The Preamble of the 1951 Convention states plainly that "it is desirable . . . to extend the scope of and protection accorded by" previous international agreements relating to the status of refugees "by means of a new agreement." 1951 Refugee Convention, Preamble.

Its departure from the IRO Constitution is evident in the language it uses to define those refugees it will not protect:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the

> international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

1951 Refugee Convention, Art. 1(F).

Gone are any mention of "quislings" and "traitors," and gone are any exclusions for any conduct except that involving "crime" or "guilt." *Id.* In contrast to the exclusions in the DPA (taken from the IRO Constitution), the exclusions in the 1951 Refugee Convention all pertain to criminal conduct. *See* Handbook, ¶¶ 147-150, 162 ("it has to be assumed . . . that the acts covered by the present clause must also be of a criminal nature.")[5]. This is true even though, at least with regard to subsection (c) above, "this is not specifically stated". *Id.* at ¶ 162.

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[5] The UNHCR Handbook (Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*) is a tool "for the guidance of government officials concerned with the determination of refugee status in the various Contracting States." Handbook, Preface at 2; *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (acknowledging that Handbook provides guidance in construing provisions added to INA by Refugee Act).

Narrowing the exclusion of refugees to those who have the culpability necessary to have actually committed a crime is consistent with the goals and purposes of the 1951 Refugee Convention. *See* 1951 Refugee Convention, Preamble. It emphasizes "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas". 1980 Refugee Act, 94 Stat. at 102, § 101. And it guarantees that innocent refugees will not be denied the protections that the United States has promised it will provide.

To be sure, where the INA intends certain aliens to be excluded regardless of their criminal culpability, it does so plainly. *See e.g.* INA § 212(a)(3)(B)(i)(V), 8 U.S.C. § 1182(a)(3)(B)(i)(V) (deeming inadmissible, without reference to conduct or culpability, any alien member of certain terrorist organizations); *accord*, INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i) (granting Secretaries of State and Homeland Security power to grant waivers to certain otherwise excludable aliens, except "no such waiver may be extended to an alien who is a member or representative of" certain terrorist organizations). In the statutory provisions applicable here, however, there is no intent to deny protection of the INA to refugees who bear no culpability for the persecutory actions they were forced to participate in. INA §§ 101(a)(42), 208(b), 241(b)(3), 8 U.S.C. §§ 1101(a)(42), 1158(b), 1231(b)(3).

POINT II The INA, Not the DPA, Applies to the Instant Asylum and Withholding Claims

There is no dispute that Petitioner Negusie's demands for asylum and withholding of removal fall under the INA, not the DPA. But the Immigration Judge, in a decision eventually affirmed by the Board of Immigration Appeals and the Court of Appeals for the Fifth Circuit, looked to this Court's interpretation of the DPA to decide whether the INA extended its protections to an armed guard in a prison where persecution occurred, without any analysis of how the statutes differed on this point. *See In re Nugusa,* File A 15 575 924 (Immigration Ct. May 31, 2005) (citing *Fedorenko* and *U.S. v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991) (affirming denaturalization of former guard at Nazi concentration camp based on application of DPA)), *aff'd sub nom. In re Nugusie,* File A15 575 924 (BIA Feb. 7, 2006), *aff'd sub nom. Negusie v. Gonzales,* 231 Fed. Appx. 325 (5th Cir. 2007). Because the DPA is a different law whose purposes in 1948, relating to the refusal to extend itself to certain aliens, would not be consistent with the purposes of the INA today, *compare supra* Point I. A *with supra* Point I. B, the immigration judge erred in directly applying the DPA.

POINT III Applying the INA Standard, Petitioner Is Entitled to a Factual Determination Regarding His Criminal Culpability

At the outset of this submission the *amici* noted that this Court in *Fedorenko* evidenced its understanding that culpability, like so much in life,

has gradations. This Court observed that the inmate who cut the victims' hair before execution stood in different shoes than the armed inmate guard who was at liberty to leave the concentration camp and who fired upon escapees. *Fedorenko,* 449 U.S. at 512, n. 34. This Court declined then to couch the issue in terms of "voluntariness" but did so in terms of "whether the particular conduct can be considered assisting in the *persecution* of civilians." *Id.* Howsoever viewed, the distinction conveys a difference, one between those who a fact finder concludes are culpable and those found not to be.

How to measure culpability under the INA should be guided by the 1951 Refugee Convention and the 1967 Refugee Protocol because Congress intended the INA to comply with this country's obligations under those agreements. *See Aguirre-Aguirre*, 526 U.S. at 427. The Convention and Protocol, in defining who is excluded from the protections afforded to otherwise eligible refugees, point to crimes "as defined in the international instruments drawn up to make provision in respect of such crimes." 1951 Convention, Art. 1F(a).[6]

The "international instruments" include several different agreements dating from the end of World War II to the present, all of which define and proscribe various forms of conduct of a criminal

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[6] The Convention and Protocol also point to "acts contrary to the purposes and principles of the United Nations" which have been interpreted to refer to conduct of a criminal nature, overlapping with the types of conduct proscribed by contemporary "international instruments." 1951 Convention, Art. 1F(c); Handbook, at ¶ 162.

nature. *See* Handbook, at ¶ 150, Annex VI (listing agreements). Not surprisingly, in these agreements "persecution" is among the conduct considered criminal. *See, e.g. Control Council Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50-55 (1946), Art. II(c) ("Crimes Against Humanity" include "persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated"); *1945 London Agreement and Charter of the International Military Tribunal*, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, Art. 6(c) (similar definition); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 ("Rome Statute"), Art. 7(1)(h) (crimes against humanity include "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law").

The conduct prohibited as criminal by the various instruments incorporates an attendant criminal culpability, either by implication, or explicitly. *See, e.g.* Rome Statute, Art. 30 (describing *mens rea* required for finding of culpability), Art. 31 (describing defenses to culpability). Without such culpability, the actor cannot be guilty of the proscribed conduct.

For instance, pursuant to the Rome Statute – the 1998 treaty entered into force in 2002 establishing the International Criminal Court – "a person shall

not be criminally responsible" for otherwise criminal conduct if the conduct was "caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person". Art. 31(1)(d). Clearly, the international community demands culpability as an element of any charged war crime or crime against humanity, and that culpability requirement extends, via the 1951 Refugee Convention and 1967 Refugee Protocol, into United States Immigration law.[7]

Because the 1951 Refugee Convention and 1967 Refugee Protocol rely on the definitions of criminal conduct found in "international instruments" such as the Rome Statute to assess whether an actor is unworthy of protection, the portions of the INA relevant to the instant case, which codify this country's conformity with the Convention and Protocol, must rely on them too. *See* S. Rep. No. 96-256, at 4 (1980 Refugee Act amending the INA was intended to "bring United States law into conformity with our international treaty obligations under the [1951 Refugee Convention and 1967 Refugee Protocol]"); S. Rep. No. 96-590, at 20 (noting that the definition of refugee was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the

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[7] Instructively, the Rome Statute also states that "[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it." Art. 31(2). The Immigration Judge in an asylum and withholding proceeding would do the same.

Protocol."). The applicable international definitions of excludable conduct incorporate culpability for prohibited crimes. *See* 1951 Refugee Convention, Art. 1F(a). That too is the standard that the legislative history of the INA clearly mandates, and which the *amici* here urge.[8] The omission to even consider, let alone apply, that standard compels reversal and remand.

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[8] Note that this imposes no new hardship on the government nor demands any new judicial resources because, under the INA, the burden of proving admissibility already falls squarely on a non-resident alien (such as a stowaway like Petitioner Negusie), *see* INA § 291, 8 U.S.C. § 1361, and the credibility of the alien's testimony alone is sufficient for an immigration judge to decide the issue, *see* INA § 208(b)(1)(B)(ii)-(iii), 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii); INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C).

CONCLUSION

For the reasons stated, the judgment should be reversed and remanded for a redetermination that considers whether Petitioner's actions as an armed guard in an Eritrean military prison were performed under duress or coercive threat sufficient to relieve him of the criminal culpability necessary to render him ineligible, as a persecutor of others, for asylum and withholding of removal under the Immigration and Nationality Act.

June 16, 2008

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AMICUS CURIAE BRIEF

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(7)

Supreme Court, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-499

IN THE

Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,
Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND 16 RELIGIOUS AND RELIGIOUS FREEDOM ORGANIZATIONS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*

The Becket Fund for Religious Liberty is a nonpartisan, interfaith, public-interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund litigates on behalf of people of all faiths in support of these principles in state and federal courts throughout the United States, as both primary counsel and *amicus curiae*. It also litigates and advocates on behalf of these principles before international fora, including the European Court of Human Rights, the United Nations Human Rights Council (where it has consultative status) and the appellate courts of many nations. Both in the United States and abroad, the Becket Fund has advocated for a vision of religious liberty that affirms that the sphere of conscience must remain inviolate.

The sixteen religious and religious freedom organizations listed below represent or protect many different, often very different, religious traditions. But each of them has joined this brief because it believes that the sphere of conscience should be protected from government interference. These organizations have in their efforts frequently

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* Undersigned counsel authored this brief in whole. No person other than counsel for *amici* has made a monetary contribution intended to fund the preparation or submission of this brief.

encountered attempts by governmental actors to interfere with freedom of conscience. They therefore have an interest in seeing American asylum law interpreted to condemn, as religious persecution, interference with the freedom of conscience. In particular they believe forced participation in acts that violate the conscience is itself persecution, and that the government should not therefore deem Petitioner Negusie a persecutor. The following organizations have joined this brief:

American Islamic Congress
American Islamic Forum for Democracy
Catholic Legal Immigration Network, Inc. (CLINIC)
China Aid Association
Dalit Freedom Network
Hindu American Foundation
Hudson Institute's Center for Religious Freedom
Human Dignity International
Institute for Global Engagement
The International Society for Krishna Consciousness
Jubilee Campaign
National Council of the Churches of Christ in the USA
Open Doors USA
Queens Federation of Churches
Sikh American Legal Defense and Education Fund
United Sikhs

SUMMARY OF ARGUMENT

Negusie was forced to participate in the persecution of his fellow believers. He contends that this makes him not a persecutor, but a victim of persecution under the asylum laws. Brief for Petitioner ("Pet. Br.") at 3.

He is far from alone. Authoritarian governments around the world and throughout history have forced religious people to participate in the persecution of fellow believers in order to violate their own consciences. The reason is simple: conscience is a threat to tyranny.

In systems where the state holds itself to be the source of all rights, the demands of conscience make its authority less than absolute. Thus the authoritarian state does not limit its attack on religious liberty to outward manifestations of belief in the public square. It also attempts to invade the sphere of conscience itself—what is called in some contexts the *forum internum*[1]—by force. The state

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[1] The *forum internum* is the "the private, inner-life of religious belief." M. Todd Parker, *The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of The ICCPR and the ECHR*, 17 DUKE J. OF COMP. & INT'L LAW 91, 94 (2006). It is "subject to unqualified protection in all the key human rights instruments * * *. PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 115 (2005). The concept has its origins in medieval

uses the threat of death or torture to cause the persecuted to shame, hurt, torture or kill fellow believers. By forcing these victims to commit acts they abhor, the state aims not only to sow mistrust among fellow believers. It also seeks to burden the individual believer's conscience with memories of immoral acts committed under duress. In short, the state attempts to alienate the believer from both others and herself.

American asylum law cannot pass over this evil in silence. Forcing someone to violate his conscience contradicts the very core of the American conception of freedom of belief. The moral condemnation of another state inherent in every grant of asylum must therefore be extended to believers who are forced under threat of death or torture to participate in the persecution of their co-religionists. And the Fifth Circuit's decision should be reversed not least because it tacitly consents to this form of religious persecution—common to authoritarian governments around the world—by holding the form of persecution to be the very reason the persecuted cannot later seek asylum.

European legal thought, *see, e.g.*, James Q. Whitman, *The Moral Menace of Roman Law and the Making of Conscience: Some Dutch Evidence*, 105 YALE L.J. 1841, 1861 (1996) ("In the medieval theological tradition, Roman law, whatever its authority, did not govern the *forum internum*, the internal court of conscience, presided over by the confessor.").

ARGUMENT

I. American asylum law should recognize and condemn the evil of forced participation in persecution of fellow believers.

A. Authoritarian governments typically target religious people and institutions because they view them as ideological competitors.

The primary concerns of authoritarian regimes are control and ultimate loyalty to the state apparatus. Authoritarian governments around the world frequently invoke security as a pretext for suppressing freedom of expression and freedom of association, both cornerstones of the freedom of religion.[2] Dissenters, especially from minority faiths, are prosecuted and punished for charges of subversion, terrorism, sedition, or counterrevolution under which peaceful critics and political opponents can be detained.[3]

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[2] *See, e.g.*, Shima Baradaran-Robinson, Brett G. Scharffs & Elizabeth A. Sewell, *Religious Monopolies and the Commodification of Religion*, 32 PEPPERDINE L. REV. 885, 929-34 (2005).

[3] Howard French, *China Confirms Protests Staged by Uighur Muslims*, N.Y. TIMES, April 3, 2008 at A12 (Uighur Muslims demonstrating for religious freedom described as "splittists."

Religious believers and dissenters are regarded by totalitarian regimes as a particular threat to state authority and security because religious believers appeal to an authority higher than the state, an unacceptably destabilizing force in states where order and control depend on the people's submission to the state as the supreme authority. Thus regimes single out religious believers by virtue not only of what they do, but of who they are. Dozens of countries either perpetrate or tolerate the forced persecution of religious believers.[4] Often the methods used are brutal, and involve coercing religious believers to violate their consciences by blaspheming, renouncing, or participating in activities contrary to their beliefs, in some cases including the direct torture of co-religionists. All of

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[4] The U.S. Secretary of State, pursuant to the International Religious Freedom Act of 1998, 22 U.S.C. § 6442(b), has designated eight countries a "Country of Particular Concern" ("CPC") – countries that have engaged in "particularly severe violations of religious freedom" including torture or cruel, inhuman, or degrading treatment. U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2007 [hereinafter US IRF REPORT 2007], available at http://www.state.gov/g/drl/rls/irf/2007/. Eritrea is currently designated one of the eight CPCs. The U.S. State Department's Office of International Religious Freedom, which makes CPC recommendations to the Secretary, reported on an additional 13 countries with significant religious freedom problems in 2007.

The United States Commission on International Religious Freedom annually publishes a study of 26 countries it considers has significant religious freedom problems, including Eritrea.

these methods are designed to reinforce the ideology or authoritarian structure the regime deems necessary by clearing away the ideological competitor of religious belief.

B. Forced persecution is one method authoritarian governments use to invade the sphere of conscience.

1. Authoritarian governments use forced persecution to undermine the conscience.

A particular method of indoctrination in totalitarian regimes is psychological. Psychological coercion is all the more devastating to its victims as it carries with it the intuition of the victim's own spiritual failure, self-loathing, and despair—it is torture that continues through memory.[5] This peculiar form of persecution has long been a standard method among tyrants and oppressors, be it the Nazis, the Soviet Union, Idi Amin or Pol Pot; all

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[5] The definition of "torture" under the Convention Against Torture—in immigration law a narrower claim than a religious persecution claim—includes infliction of severe suffering that is purely mental. *See* 8 C.F.R. § 208.18(a)(1) ("Torture is defined as any act by which severe pain or suffering, ***whether physical or mental***, is intentionally inflicted on a person * * *.) (emphasis added). *See also* United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

forced their subjects to spy on one another, brutalize one another, and even execute one another.

The psychological torment that this engenders is exquisitely painful when applied in the context of religious belief. That's because the entire basis for the victim's conscientious objection, and hence, the government's oppression, is the victim's conviction that there is a transcendent standard of good and evil to which he or she must adhere at all costs and which he or she has now betrayed out of weakness or cowardice. This intentionally inflicted despair is a cruel twist on the more straightforward methods of persecution employed by authoritarian governments.

2. The Piteşti Experiment

Perhaps the paradigmatic example of a government attack on conscience designed to undermine resistance to an authoritarian regime is the *Experimentul Piteşti* ("Piteşti Experiment"). The Romanian Communist government used Piteşti prison outside Bucharest for the violent reeducation of political and religious prisoners from 1949-1952:

> Prisoners were compelled to confess their own crimes against the state and to betray others, even beloved family members. But since the point of Pitesti was not just extortion of information but re-education

> (that is, brainwashing), the work proceeded in a series of "unmaskings." The phase of "public moral unmasking" required the prisoner to blaspheme and renounce their deepest emotional ties and spiritual convictions: "I lied when I said 'I believe in God.' I lied when I said, 'I love my mother and my father.'" * * * Christians were compelled to participate in blasphemous versions of Romanian Orthodox liturgical rites: a parody baptism was performed as their heads were dunked in a bucket of urine and feces.
>
> * * **
>
> In the final phase of unmasking, prisoners were required to prove their full conversion by torturing other prisoners, including their best friend. * * * This ingenious step insured that the spirit would be utterly broken, and that distrust and misery would make cooperation in an uprising much less likely.

Frederica Mathewes-Greene, *Abu Ghraib and Pitesti*, DALLAS MORNING NEWS, May 26, 2004. The prisoners' conscience had to be crushed to make way for Marxism:

> It was necessary in the project to repress any tendency to return to an anti-Marxist equilibrium * * * based on the following principles of life: faith in God, tradition and family; * * * friendship; love in its usual worldly sense and love of mankind in general; and finally, one's own ego, with its own intimate life and its anxieties.
>
> * * **
>
> In order to extinguish the last trace of respect for holy things, ritual parodies of all Christian ceremonies were arranged, with students of theology compelled to modify prayer texts, substituting vulgar oaths for religious phrases.

DUMITRU BACU, THE ANTI-HUMANS 87-89 (1971).

At Piteşti, prisoners were thus forced to participate in persecution of fellow believers in two distinct ways: (1) through physical torture of other prisoners and (2) through participation in ceremonies they and their fellow believers believed to be blasphemous. Moreover, both forms of forced participation in persecution had at least ***two*** victims; believers were the vehicles of persecution for both themselves and others. In fact, the very reason the guards at Piteşti conducted blasphemous ceremonies ***in public*** was to burden—to scandalize—the

consciences of both those participating and those watching.[6]

Yet under the Fifth Circuit's interpretation of the persecutor bar, all of the prisoners at Piteşti would be "persecutors" forbidden to seek asylum in the United States. Indeed, the Fifth Circuit would have called prominent Romanian dissident and exile Father Gheorghe Calciu-Dumitreasa a "persecutor," since he had, under duress, tortured other prisoners at Piteşti.[7] This absurd result contradicts the moral valence of American asylum law.[8]

C. Granting asylum to those forced, like Negusie, to participate in persecution of fellow believers reflects the moral condemnation of religious persecution embodied in American asylum law.

Granting asylum is not just a judgment about the blameworthiness of the asylum applicant, though it is that. *See* Pet. Br. at 26. It is also a moral condemnation of the government the asylum

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[6] *See* BACU at 90-91.

[7] *See* Patricia Sullivan, *Anti-Communist Priest Gheorghe Calciu-Dumitreasa*, WASHINGTON POST, Nov. 26, 2006, at C09; Mathewes-Green.

[8] *See generally* Nicole Lerescu, Note, *Barring Too Much: An Argument in Favor of Interpreting the Immigration and Nationality Act Section 101(A)42 to Include a Duress Exception*, 60 VANDERBILT L. REV. 1875 (2007).

applicant is fleeing from. "[T]he persecution criterion codifies the substantive moral judgment that underlies a decision to grant asylum-namely, the judgment that a state has harmed its citizen illegitimately." Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARVARD INT'L L.J. 413, 425 (2006). *See also Osaghae* v. *United States INS*, 942 F.2d 1160, 1163 (7th Cir. 1991) (quoting *Zalega* v. *INS*, 916 F.2d 1257, 1260 (7th Cir. 1990)) (Posner, J.) ("'Persecution' means, in immigration law, punishment for political, religious, or other reasons that our country does not recognize as legitimate."); *Dandan* v. *Ashcroft*, 339 F.3d 567, 573 (7th Cir. 2003) (same); *Fisher* v. *INS*, 79 F.3d 955, 961 (9th Cir. 1996) (persecution is "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive.") To withhold condemnation because the religious victim participated, under duress, in mistreating his fellow believers makes a hash of the moral basis for all asylum law. It is also out of step with our country's consistent conception of freedom of conscience and belief.

1. American law has consistently condemned the use of government power to violate the conscience.

American law has consistently condemned efforts to use the power of the state to force someone to say

or do something that violates her conscience. Perhaps the earliest example of this tendency is the Religious Test Clause in the original Constitution. It prohibits the government from requiring candidates for federal office to, among other things, swear an oath to uphold a particular religious view or to participate in a sacrament as a condition of obtaining or retaining office.[9] This is an early recognition that forcing a person to say something she does not believe in violates basic American conceptions of religious liberty.

More recently, this Court has rejected attempts to force religious believers to engage in what they believed to be idol worship—pledging allegiance to the flag. In 1940, the Court upheld a compulsory pledge statute against a Free Exercise challenge by a group of Jehovah's Witnesses, who believed reciting the Pledge of Allegiance was "bowing down" to a "graven image." *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 592 n.1 (1940). Justice Stone dissented, arguing that

> it is a long step, and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young,

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[9] *See* U.S. CONST. art. VI, § 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"). Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise Clause*, 103 HARVARD L. REV. 1409, 1473-74 & n.323 (1990).

compel public affirmations which violate their religious conscience.

* * * *

> The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit and of reasonable freedom and opportunity to express them. They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression, and his freedom, and that of the state as well, to teach and persuade others by the communication of ideas. The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.

Gobitis, 310 U.S. at 602-604 (Stone, J., dissenting). Three years later Jehovah's Witnesses brought

another Free Exercise challenge to a compulsory pledge statute.[10] This time this Court sustained the challenge, holding

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

West Virginia Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943). The "sphere of intellect and spirit" in *Barnette* is the sphere of conscience, the *forum internum* that the First Amendment protects. The flip side of this protection is the condemnation of any "invasion" of this sphere. Granting asylum to those who are fleeing religious persecution is just such a condemnation.

2. *American condemnation of the use of government power to violate the individual conscience should be extended to Eritrea's use of force to coerce Negusie to persecute his fellow believers.*

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[10] *Barnette* v. *West Virginia Bd. Of Educ.*, 47 F. Supp. 251, 252 (S.D.W.Va. 1942) (plaintiffs contended that "the regulation amounts to a denial of religious liberty").

American law condemns Eritrea's persecution of Negusie for the same reasons it has consistently condemned invasions of the sphere of conscience. Forcing a religious person to harm his fellow believers is no less a violation of his conscience—and in some ways a greater one—than is physical torture. Eritrea's actions are meant to divide Negusie and his fellow believers both among themselves and within each conscience. Like the torturers of Piteşti, the Eritrean government aims to overcome any resistance to its rule by undermining the consciences of religious dissenters. American law condemns Eritrea's aims no less than it does those of the Piteşti Experiment. Its asylum laws should be interpreted to give force to that condemnation.

Were this Court by contrast to hold that coerced participation in the persecution of co-religionists is ***not*** itself persecution, it would create a particularly perverse incentive. Authoritarian governments would see an advantage in setting religious believers to torture one another, since that would automatically disqualify them from gaining asylum in the United States. In that scenario, the method of religious persecution (forcing a believer to do something that violates his conscience) would become the very reason why an asylum seeker could never receive asylum.

II. Eritrea and other human rights violators continue to engage in religious persecution designed to invade the sphere of conscience.

The persecution Negusie faced in Eritrea is widespread. Countries generally acknowledged to be the worst human rights violators in the world uniformly persecute believers—of many different faiths—in an attempt to disconnect them from their conscientiously held religious beliefs.

As Negusie points out, Eritrea is one of the world's worst violators of religious liberty principles. Pet. Br. 12-13. In fact, Eritrea is one of only eight countries in the world that the Secretary of State has designated as a "Country of Particular Concern" under the International Religious Freedom Act of 1998, 22 U.S.C. § 6442(b) ("IRFA"). The others are Burma, China, Iran, North Korea, Saudi Arabia, Sudan and Uzbekistan.[11] The United States government has also imposed export sanctions on Eritrea under the IRFA.[12].

And Negusie's predicament is by no means limited to Eritrean asylum seekers. As the following

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[11] U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2006, available at http://www.state.gov/g/drl/rls/irf/2006/; *see also* US IRF REPORT 2007.

[12] *See* Suspension of Defense Export Licenses to Eritrea, 71 Fed. Reg. 11281-03 (March 6, 2006)

examples show, the problem of government persecution aimed squarely at the conscience of religious believers is a ubiquitous one.

1. Religious persecution in North Korea

The Democratic People's Republic of Korea ("North Korea" or "DPRK") is a dictatorship led by Kim Jong Il, the late president Kim Il Sung's son. Along with Juche, an ideology of self reliance, the cult of personality organized around Kim Jong Il and Kim Il Sung is ideologically crucial to the maintenance of the North Korean regime.[13] The cult

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[13] The worship of Kim Il Sung and Kim Jong Il is outlined in the Ten Great Principles of Unique Ideology, announced in 1974:

1. Struggle with all your life to paint the entire society with the one color of the Great Leader Kim Il Sung's revolutionary thought.
2. Respect and revere highly and with loyalty the Great Leader Kim Il Sung.
3. Make absolute the authority of the Great Leader Kim Il Sung.
4. Accept the Great Leader Kim Il Sung's revolutionary thought as your belief and take the Great Leader's instructions as your creed.
5. Observe absolutely the principle of unconditional execution in carrying out the instructions of the Great Leader Kim Il Sung.
6. Rally the unity of ideological intellect and revolutionary solidarity around the Great Leader Kim Il Sung.

of personality is evidenced by omnipresent portraits of the Kims in every house and public building. Additionally, ideological statements and scriptures produced by the two leaders are the main basis of education for both children and adults. Children in schools are taught that the Kims came down from heaven and were placed on the top of Mount Paektu, where they were transformed into human beings. At public events, songs are sung that depict the leaders as saviors of the country as well as of each individual citizen.

> Indoctrination [in these ideologies is] intended to ensure loyalty to the system and the leadership, as well as conformity to

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7. Learn from the Great Leader Kim Il Sung and master communist dignity, the methods of revolutionary projects, and the people's work styles.
8. Preserve dearly the political life the Great Leader Kim Il Sung has bestowed upon you, and repay loyally for the Great Leader's boundless political trust and considerations with high political awareness and skill.
9. Establish a strong organizational discipline so that the entire Party, the entire people, and the entire military will operate uniformly under the sole leadership of the Great Leader Kim Il Sung.
10. The great revolutionary accomplishments pioneered by the Great Leader Kim Il Sung must be succeeded and perfected by hereditary successions until the end.

These principles are used in criminal cases as law.

> the state's ideology and authority. * * * Refusal on religious or other grounds to accept the leader as the supreme authority, exemplifying the state and society's needs, was regarded as opposition to the national interest and sometimes resulted in severe punishment.[14]

The DPRK government's view of religion as a threat to its authoritarian power can be seen in its Constitution, which Article 68 states, "No one may use religion as a pretext for drawing in foreign forces or for harming the State and social order." In a public lecture entitled "Let us crush the enemy's concealed conspiracy to propagate religions amongst us," the DPRK in 2005 proclaimed that the struggle to prevent religious penetration was a "serious and great ideological battle for the political and ideological protection of Our Revolutionary Leader and Beloved General Kim Il Sung." It also declared that it regards religion as a means of "toppling national systems," as a "breach of national self-reliance," and most ironically, a "violation of human rights."[15]

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[14] U.S. DEP'T OF STATE, NORTH KOREA: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2007. Available at http://www.state.gov/g/drl/rls/irf/2007/90140.htm (last visited June 20, 2008).

[15] Korea Institute for National Unification, White Paper on Human Rights in North Korea, 2007, (Aug. 31, 2007), at 184-5.

> The DPRK characterized "[m]ost religiously active people * * * as anti-national and counterrevolutionary hostile elements" who were then to be "subjected to ruthless persecution."[16] In 1962, "Great Leader" Kim Il Sung stated the reason for the mass disappearance and possible extermination of hundreds of thousands of religious believers:
>
> [We] cannot carry such religiously active people along our march toward a Communist society. Therefore, we tried and executed all religious leaders higher than deacon in the Protestant and Catholic churches. Among other religiously active people, those deemed malignant were all put to trial. Among ordinary religious believers, those who recanted were given jobs while those who did not were held in concentration camps.[17]

Religious activities that are not government-sponsored are "now almost nonexistent" and "government-sponsored religious groups exist to

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[16] *Id.* at 171.

[17] KOH TAE-WOO, NORTH KOREA'S POLICY ON RELIGION 79 (1989).

provide [the] illusion of religious freedom" in interactions with foreign visitors.[18]

2. Religious persecution in China

The Constitution of China purports to respect the freedom of religious belief or non-belief. However, the Chinese constitution also notably omits protecting the freedom of religious ***expression***.[19] The authoritarian Chinese Communist Party ("CCP") is very suspicious of religion as a political motivator, and it therefore uses registration and surveillance as tools to control religious activity.[20] Places of worship and religious groups must be registered with the Chinese government's State Administration for Religious Activities ("SARA," formerly the Religious Affairs Bureau). The CCP uses security forces to control religious groups not recognized by the government.

The CCP recognizes only five religions (Buddhism, Islam, Taoism, Catholicism, and Protestantism), and has withstood attempts to

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[18] CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/kn.html (last visited June 19, 2008)

[19] U.S. DEP'T OF STATE, CHINA: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2007. Available at http://www.state.gov/g/drl/rls/irf/2007/90133.htm (last visited June 20, 2008).

[20] *Id.*

register new ones.[21] Groups like house churches, the unrecognized Roman Catholic Church, Falun Gong, and the Dalai Lama and his Tibetan followers operate outside of the registered boundaries. Religious groups have sometimes resisted registration with the SARA because of rules that require the name and address of all members (for fear of what the government will do with such information).

Registered groups assent to CCP-standardized theological formulations, and the distribution of state censored messages.[22] The Chinese government dictates the theological content of what is taught in registered places of worship and restricts the public expressions of religious belief by members of registered places of worship:

> China continues to arrogate to itself the rights to determine religious doctrine, determine what is Christian heterodoxy, and designate religious leaders * * *. Religious leaders cannot preach outside of their own area. They and their venue must be approved by the government. Religious services and members are subject to monitoring. Sermons must stick to approved topics under penalty of arrest.

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[21] *Id.*

[22] *Id.*

> Seminaries and schools for theological training exist but are tightly controlled: Students, the Chinese authorities believe, must be "politically reliable." * * * * Registration [of Christian churches] requires that churches desist from speaking about the Second Coming of Christ, the gifts of the Spirit, the story of Creation in Genesis, [or] certain sections of the Catholic Catechism.

Freedom House Center for Religious Freedom,[23] *Report Analyzing Seven Secret Chinese Government Documents* (Feb. 11, 2002) at 2.

The CCP imposes criminal punishment upon members of unregistered religious groups for assembling with others, teaching religious beliefs (even to their own children), publicly professing their beliefs, receiving donations, holding or administering land or buildings, issuing or selling religious publications, managing property and income, and creating social service enterprises.

Unregistered religious groups have no legal standing to bring challenges against the actions of

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[23] Now *amicus* Hudson Institute's Center for Religious Freedom.

government officials.[24] Therefore, they are particularly vulnerable to abusive police practices and denials of due process. Although religious regulation varies from jurisdiction to jurisdiction, unregistered religious minority groups throughout the country are frequently arrested, harassed, or sent to labor camps.

In 1999, the Chinese government added the so-called Anti-Cult Law (Article 300) to its Criminal Law Code.[25] The Anti-Cult Law created extensive

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[24] *See* Registration Procedures for Venues for Religious Activity, (promulgated by SARA's predecessor, the Religious Affairs Bureau of the State Council, May 1, 1994) art. 9, translated in http://www.1488.com/english/laws/public/#1 (last visited: June 22, 2008) (requiring religious activities to register to be certified as juridical persons, and stating that a religious venue as juridical person "independently enjoys civil rights and takes on civil responsibilities"); Freedom of Religious Belief in China, Information Office of the State Council of the People's Republic of China Beijing (October, 1997). http://news.xinhuanet.com/employment/2002-11/18/content_633195.htm ("*Once* a site for religious activities is registered according to law it has legal status and its lawful rights and interests shall be protected.") (emphasis added); Regulation Governing Venues for Religious Activities, (promulgated by the State Council, Jan. 31, 1994) art. 2, translated in http://www.1488.com/english/laws/public/#3 (last visited: June 22, 2008) (requiring registration to establish a religious venue).

[25] Criminal Law of the People's Republic of China (promulgated by the Fifth National People's Congress, Jul. 1, 1979) available at

powers for authorities to suppress "cults."[26] The Chinese government quickly began using the Anti-Cult Law as a means to dismantle disfavored religious groups.

There are widespread allegations of torture of religious believers in China. Documented torture methods include "the use of beatings, use of electric shock batons; cigarette burns; * * * use of handcuffs or ankle fetters for extended periods (including in solitary confinement or secure holding areas), . . . being forced to maintain uncomfortable positions, such as sitting, squatting, lying down, or standing for long periods of time, sometimes with objects held under arms; deprivation of sleep, food or water; . . . denial of medical treatment and medication; hard labour; and suspension from overhead fixtures from handcuffs." [27]

China's labor camps are considered "re-education" camps and attempt to force detainees to relinquish

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http://www.cecc.gov/pages/newLaws/criminalLawENG.php (last visited June 22, 2008).

[26] Article 300 of the Criminal Law of the People's Republic of China, *id.*

[27] Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Civil &Political Rights, Including the Question of Torture & Detention*, [hereinafter *Civil & Political Rights*], at 13, delivered to the Economic & Social Council, Comm'n on Human Rights, E/CN.4/2006/6/Add.6 (Mar 10. 2006).

their beliefs.[28] Reports estimate that up to 50% of prisoners in the re-education labor camps are Falun Gong members. The UN Special Rapporteur noted that fellow detainees lead other detainees through the re-education and the practice of religion is prohibited.[29] Even within the normal prison system, a Tibetan nun alleged that she was beaten for not participating in Chinese patriotic songs.[30] After recent unrest in Tibet, the Chinese government has begun "reeducation" programs that include forcing Tibetan monks to denounce the Dalai Lama, a figure they revere as holy.[31]

State control of information and ideology in China is such that in some cases, the spread of information about Chinese practices with regard to religious organizations is a sufficient ground for arrest and imprisonment. A court in 2004 sentenced three men

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[28] US IRF Report 2007; Amnesty International Report, *Fear of Ill-treatment or Torture/health Concern*, ASA 17/062/200417 (Dec. 14, 2004), available at http://www.amnesty.org/en/library/asset/ASA17/062/2004/en/dom-ASA170622004en.pdf.

[29] *Civil & Political Rights*, at 19.

[30] Amnesty International Press Report, *China: Tibet's Longest-Serving Female Prisoner of Conscience Finally Released* Feb 27, 2004, available at http://www.amnesty.org/en/library/asset/ASA17/010/2004/en/dom-ASA170102004en.html.

[31] Howard French, *New Ethnic Unrest Erupts in a Tibetan Region of China*, N.Y. TIMES, April 5, 2008 at A8.

to prison terms for reporting on abuse and destruction of house churches to a US-based magazine.[32]

3. Religious persecution in Burma

Burma has been ruled by successive military regimes since General Ne Win seized power in a coup in 1962. The current ruling military regime, known as the State Peace and Development Council ("SPDC"), systematically persecutes minority religions such as Christianity and Islam. The SPDC restricts the building of places of worship, distribution of religious literature, censors sermons, and arbitrarily detains Christian and Muslim leaders. Muslims and Christians are often refused permits for religious gatherings, and for any renovation or construction of places of worship.[33]

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[32] Amnesty International News, *China: Religious Freedom Rhetoric Fails to Translate into Reality*, ASA 17/065/2004, Dec. 21, 2004, available at http://www.amnesty.org/en/library/asset/ASA17/065/2004/en/dom-ASA170652004en.pdf.

[33] U.S. DEP'T OF STATE, BURMA: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2007. Available at http://www.state.gov/g/drl/rls/irf/2007/90131.htm (last visited June 20, 2008); *see also* Religious Persecution: A Campaign of Ethnocide Against Chin Christians in Burma, Chin Human Rights Organisation, February 2004, http://www.chro.org/images/stories/File/pdf/ReligiousPersecution.pdf (hereinafter "CHRO Report") and *Crackdown on Burmese*

The junta has closed down mosques and churches, sometimes forcibly demolishing them.[34] The Burmese army has also destroyed crosses on public display in villages in recent years, often forcing Christian villagers to construct Buddhist temples in place of the crosses.[35] On 3 January 2005, Burmese army troops pulled down a 15-metre (50-foot) cross, believed to be the last remaining cross on public display, on a hillside in Matupi, in Chin State of north-western Burma.[36]

The government sometimes forces non-Buddhists to convert to Buddhism. For instance, there is a state sponsored campaign to coerce minority Christians to convert to Buddhism. The Burmese junta targets ethnic Chin Christians for forced labour and other abuses while exempting families who

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Muslims, Human Rights Watch, July 2002, http://www.hrw.org/backgrounder/asia/burmese_muslims.pdf.

[34] Burma: IRF Report, *supra*. *See* CHRO Report, *id.*, for full account of stop orders and destruction of churches by the Burmese junta, and *Crackdown on Burmese Muslims*, Human Rights Watch, July 2002, at 4, http://www.hrw.org/backgrounder/asia/burmese_muslims.pdf.

[35] Benedict Rogers, *Burma: Continuing large-scale religious freedom violations*, F18NEWS, April 5, 2005, http://www.forum18.org/Archive.php?article_id=538&pdf=Y; *see* also CHRO Report, *supra*, for an account of crosses destroyed by the Burmese junta.

[36] *Id.*

convert to Buddhism.[37] Those who convert also

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[37] A pamphlet distributed widely by Buddhist monks of the Hill Region Buddhist Missions, a group brought into the Chin state by the Burmese junta sets out the following ways to attack Christianity in the region:

1. To attack Christian families and the progress of Christians.
2. To criticize against the sermons which are broadcast from Manila, Philippines.
3. To criticize God as a narrow-minded and egotistical who himself claimed that "There is no god except eternal God".
4. To criticize Christian ways of life as corrupted and inappropriate culture in Burma.
5. To criticize the preaching of Christians where it has penetrated.
6. To criticize Christianity by means of pointing out its delicacy and weakness.
7. To stop the spread of the Christian movement in rural areas.
8. To criticize by means of pointing out "there is no salvation without purchased by the blood of Christ".
9. To counterattack by means of pointing out Christianity's weakness and overcome this with Buddhism.
10. To counter the Bible after thorough study.
11. To criticize that "God loves only Israel but not all the races".
12. To point out ambiguity between the two testaments.
13. To criticize on the point that Christianity is a partisan religion.
14. To criticize Christianity's concept of the Creator and compare it with the scientific concept.
15. To study and access the amount given in offerings.
16. To criticize the Holy Bible after thorough study.

receive other benefits such as monthly allowances and rations.[38] The SPDC also force Christian villagers to work during religious festivals and on Sundays.[39] Some Chin Christian children have been lured away from their families with the offer of a good education; the authorities however force these children, some as young as 11, to become novice monks.[40]

Although the junta purports to support Buddhism, which is the majority religion, it in fact seeks to control the religion and has used force to suppress dissent amongst Buddhist monks. It restricts efforts by Buddhist clergy to promote human rights. The crackdown on the "Saffron Revolution" in 2007 is one of the more visible examples of religious persecution of both majority

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17. To attack Christians by means of both non-violence and violence means.

CHRO Report, *supra*.

38 CHRO Report, *supra*.

39 In Sabunte, Chin State, Burma Army soldiers ordered villagers to work as porters for the military from 20 December 2003 until 19 January 2004, meaning they were unable to celebrate Christmas and New Year in their villages. Benedict Rogers, *Burma: Continuing large-scale religious freedom violations*, F18NEWS, April 5, 2005, http://www.forum18.org/Archive.php?article_id=538&pdf=Y

40 Benedict Rogers, *Burma: Continuing large-scale religious freedom violations*, F18NEWS, April 5, 2005, http://www.forum18.org/Archive.php?article_id=538&pdf=Y; *see* also CHRO Report, *supra*.

and minority religious groups that occurs regularly at the local level.[41] For example, in 1988, an estimated 600 monks were killed during a pro-democracy demonstration.[42] When monks and novices refused to accept alms from military officials or perform religious ceremonies in protest at the military regime in 1990 and 2003 during a campaign known as "Overturning the Bowls," they were arrested.[43] Monks who are arrested and imprisoned are forcibly disrobed and tortured.[44]

4. Religious persecution in Uzbekistan.

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[41] *See, e.g.*, Seth Mydans, *Myanmar Monks' Protest Contained by Junta's Forces*, NEW YORK TIMES, September 28, 2007, available at http://www.nytimes.com/2007/09/28/world/asia/28cnd-myanmar.html.

[42] Assistance Association for Political Prisoners (Burma), Burma: A Land Where Buddhist Monks Are Disrobed and Detained in Dungeons, at 13-4, available at http://www.aappb.org/monkreport.pdf (hereinafter "Buddhist Monks Report"). Two years later, the military opened fire at more than 7,000 monks and novices who marched through the streets of Mandalay, receiving alms peacefully in memory of the 1988 uprising. *Id.* at 14-5.

[43] Buddhist Monks Report, *id.* at 14-5, 20-2.

[44] *See, e.g.*, Assistance Association for Political Prisoners (Burma) Press Release, *Number of Political Prisoners Increases in 2007: Crackdown in Burma Continues*, http://www.aappb.org/release100.html.

Uzbekistan is officially a democratic country. But human rights groups including Human Rights Watch, Amnesty International, and the U.S. State Department call Uzbekistan "an authoritarian state with limited civil rights."[45] Uzbekistan perpetrates widespread human rights violations, including torture, arbitrary arrests, and various restrictions of freedoms: of religion, of speech and press, of free association and assembly, and particularly target religious believers, independent journalists, human rights activists, and political opposition members. In 2005, Freedom House included Uzbekistan in its list of "The Worst of the Worst: The World's Most Repressive Societies."

A campaign to control the Muslim faith has become a major national operation consisting of "a network of secondary and higher educational institutes, who educate the state-appointed imams of the country's mosques."[46] Students in religious education (which is only legal if administered by the state) are instilled with loyalty to the President while the government also sustains a network of "informers

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[45] U.S. DEP'T OF STATE, UZBEKISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2007. Available at http://www.state.gov/g/drl/rls/irf/2007/90237.htm (last visited June 20, 2008).

[46] Igor Rotar, *Uzbekistan: Religious Freedom Survey, May 2006*, F18NEWS, May 10, 2006, available at: http://www.forum18.org/Archive.php?article_id=777.

amongst the students."[47] Muslim clergy are also kept under a tight watch by the government and do not have the freedom to write their own Friday addresses but rather must deliver ones pre-approved by the government religious leadership.[48]

Uzbekistan is known for arresting devout religious believers under the guise of an unrelated criminal violation. For instance, the State Department reported that "police planted narcotics, ammunition, and, beginning in 1999, religious leaflets, on citizens to justify their arrests."[49] Muslims who are thus arrested are further persecuted once they are imprisoned, as they are "often prohibited or prevented from praying regularly, possessing a Koran, and observing religious obligations."[50] Furthermore, prisoners may be subject to even more severe punishment for rejecting government-approved, "interpretations of Islam presented by imams visiting their prisons."[51]

The government has also been active in repressing Protestant Christians. One university

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47 *Id.*

48 *Id.*

49 U.S. DEP'T OF STATE, UZBEKISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2003. Available at http://www.state.gov/g/drl/rls/irf/2003/24443.htm (last visited June 20, 2008).

50 *Id.*

51 *Id.*

student was reported for holding religious meetings in his home. When the policed raided his apartment during one of the meetings they fined the leader and forced two of the attendants to sign statements renouncing their faith.[52]

These examples illustrate a small portion of the larger scale crusade against religious freedom and other human rights. As a result of such violations, Uzbekistan has long been a concern of the United Nations (UN) and the United States. Uzbekistan was watched under the UN's 1503 procedure—a confidential scrutinizing method—for many years until 2007 when the Human Rights Council did not vote to renew it.[53] In 2003, the presence of widespread torture methods led the UN special rapporteur to issue recommendations and while the 1503 project was lifted, a special report on torture in Uzbekistan was issued again in 2007.[54]

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[52] Igor Rotar & Felix Corley, *Uzbekistan: Despite official denials, religious freedom violations continue*, WorldWide Religious News, Nov. 28, 2006, http://www.wwrn.org/article.php?idd=23536&sec=59&con=40.

[53] Human Rights Watch, *UN: Rights Council Fails Victims in Iran, Uzbekistan*, March 27, 2007: http://www.hrw.org/english/docs/2007/03/27/uzbeki15577.htm.

[54] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Nov. 5-23, 2007, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, U.N. Doc. CAT/C/UZB/CO/3.

5. Religious persecution in Turkmenistan.

Turkmenistan was formerly under the control of President Saparmurat Niyazov. He created a personality cult around himself which included oaths of loyalty, a set of "vanity scriptures" called the Ruhnama, and the installation of portraits of himself in mosques and churches throughout Turkmenistan. Newspapers were topped by the oath, which read:

> Turkmenistan, you are always with me in my thoughts and in my heart. For the slightest evil against you let my hand be cut off. For the slightest slander about you let my tongue be cut off. At the moment of my betrayal of my motherland, of her sacred banner, of Saparmurat Turkmenbashi [Father of the Turkmens] the Great [i.e. President Saparmurat Niyazov], let my breath stop.[55]

Imams were also instructed to begin services with sermons praising him and to end daily prayers with the oath.[56] Forum18 reports President Niyazov as once stating "we have one religion and unique

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[55] Felix Corley, *Religious Freedom Survey*, F18NEWS, October 2005, http://www.forum18.org/Archive.php?article_id=672.

[56] Felix Corley, *President's Personality Cult Imposed on Religious Communities*, FORUM18, Mar 1, 2005, http://www.forum18.org/Archive.php?article_id=522.

traditions and customs, and there is no need for people to look beyond these."[57]

Mosques were required to give equal place to the Ruhnama as the Qu'ran and Russian Orthodox churches were required to have at least two copies in the parish library.[58] The Ruhnama was used in all levels of school instruction, and continue to be present today.[59] Texts from the Ruhnama are inscribed on a Mosque in President Niyazov's hometown. His preferred title is inscribed on the wall facing Mecca, which offends some Muslims.[60] His presidency ended with his death in December 2005.[61]

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[57] Igor Rotar, *"Virtual Catastrophe" for Muslim Theological Faculty*, FORUM18, July 22, 2005, http://www.forum18.org/Archive.php?article_id=614.

[58] United States Commission on International Religious Freedom [hereinafter USCIRF], Turkmenistan Policy Focus 2 (Winter 2007) http://www.uscirf.gov/images/stories/pdf/Turkmenistan/turkmenistan_policyfocus1207.pdf.

[59] U.S. DEP'T OF STATE, TURKMENISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT, 2007. Available at http://www.state.gov/g/drl/rls/irf/2007/90236.htm (last visited June 20, 2008).

[60] USCIRF 6.

[61] Since President Niyazov's death, President Berdimuhammedov has nominally adjusted policies. USCIRF 7. The place of the Ruhnama has been decreased in public schooling although it is still present in some state-controlled mosques. USCIRF 4 & 6.

Some religious minority members lost their jobs if they refused to pay fines or sign statements admitting their guilt in leading worship services.[62] Others were forced under official pressure to sign statements claiming to have quit.[63] Jehovah's Witnesses who peacefully object to compulsory military service have been sentenced to prison terms in forced labor camps.[64] Other religious dissension may result in loss of employment.[65]

* * *

What these examples demonstrate is that the evil of religious persecution aimed specifically at scandalizing the conscience is a widespread one. It cuts across all times, cultures and places, and members of every religion have at some point been its victims. It is a sickness of the human soul. American asylum law should not act as if it were ignorant of this fact, or worse, consent to the manipulation of conscience as a tool of persecution,

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[62] Felix Corley, *Old "Offences" Used to Punish Current Religious Activity*, F18NEWS, July 20, 2007, http://www.forum18.org/Archive.php?article_id=522.

[63] *Id.*

[64] Felix Corley, *Fifth Conscientious Objector to be Prosecuted?* F18NEWS, Aug. 31, 2007, http://www.forum18.org/Archive.php?article_id=1013, USCIRF 4.

[65] Turkmenistan: IRF Report, *supra*.

by allowing that very method of persecution to become a barrier to asylum.

CONCLUSION

Eritrea should be condemned for forcing Negusie to participate in persecuting his fellow believers. Granting asylum to victims of religious persecution is one way to do that. Moreover, religious people and religious organizations will likely suffer more persecution, not less, if the Fifth Circuit's ruling is not overturned. Its judgment should therefore be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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FILED
JUN 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-499

In The
Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,
Petitioner

v.

MICHAEL B. MUKASEY,
ATTORNEY GENERAL OF THE UNITED STATES
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS FIRST, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, HUMAN RIGHTS WATCH, AND U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS IN SUPPORT OF PETITIONER

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JUNE 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI*

Amici are human rights organizations, legal services organizations, and refugee resettlement organizations, all of whom work with and/or advocate for refugees. *Amici* are filing this brief in support of the petitioner to bring to the Court's attention the impact affirmance of the lower court's decision in this case would have on refugees who have been subject to coercion at the hands of persecutors.

Human Rights First has worked since 1978 to protect and promote fundamental human rights. Human Rights First grounds its refugee protection work in the standards set forth in the 1951 Refugee Convention, its 1967 Protocol, and other international human rights instruments, and advocates adherence to these standards in U.S. law and policy. Human Rights First has had a longstanding interest in the proper application of the "exclusion" clauses of the Refugee Convention, and has conducted research, convened legal experts, and provided guidance to assist in the development of effective and fair methods for excluding those who are not entitled to refugee protection. It coordinated a special issue of the International Journal of Refugee Law, 12 IJRL Special Supplementary Issue on Exclusion (2000), as part of a multi-year research project on exclusion that resulted in the publication of the report *Refugees, Rebels & the Quest for Justice* (2002). Human Rights First also operates a *pro bono* asylum program that provides free legal representation to indigent asylum applicants.

The American Immigration Lawyers Association ("AILA") is a national association with more than

10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law in this field; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the legal and ethical standards of the immigration bar. AILA's members practice regularly before the Department of Homeland Security and the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Human Rights Watch started in 1978 as Helsinki Watch, to monitor the compliance of Soviet bloc countries with the human rights provisions of the Helsinki Accords. It is now the largest human rights organization based in the United States, and conducts fact-finding investigations into human rights abuses in all regions of the world. Human Rights Watch documents abuses related to armed conflicts, advocates for the protection of civilians, and works to hold perpetrators accountable for violations of international human rights and humanitarian law. Since 1994, Human Rights Watch has documented the recruitment and use of children as soldiers by all parties to armed conflict in countries including Angola, Chad, Colombia, Liberia, Myanmar (Burma), Nepal, Sierra Leone, Sri Lanka, Sudan, and Uganda. Human Rights Watch seeks to address the root causes that force people to flee, advocates for greater protection for refugees and internally displaced persons, and calls on the United Nations and on governments

everywhere to uphold their obligations to protect refugees and to respect their rights.

The U.S. Committee for Refugees and Immigrants ("USCRI") is a non-governmental organization that works to address the needs and rights of persons in forced or voluntary migration worldwide by advancing fair and humane public policy, facilitating and providing direct professional services, and promoting the full participation of migrants in community life. USCRI works through a nationwide network of partner agencies, state and local governments, and private enterprises to provide essential services to refugees and immigrants. USCRI's National Children's Center works with the private bar to provide *pro bono* legal representation to unaccompanied immigrant children before the immigration courts.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Human Rights First and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The issue in this case is whether a refugee who was forced, by threats of severe harm or violence, to inflict harm on another, must be excluded from asylum, and may be returned to a country where his life and freedom would be threatened, without regard for the fact that he acted under duress. The Fifth Circuit in this case held that whether a refugee acted under coercion—even including credible threats of imminent death or torture—is entirely irrelevant to the application of the persecutor bar. *Negusie v. Gonzales*, 231 Fed. Appx. 325 (5th Cir. 2007). It is the position of *amici* that excluding a refugee from the protection of asylum and withholding of removal as a persecutor of others without regard to whether he acted under duress does violence to the text of the statute, negates the humanitarian objectives that motivated Congress's passage of the Refugee Act of 1980, and violates the treaty obligations of the United States under the 1967 Refugee Protocol, which Congress in passing the Refugee Act intended to fulfill. This brief seeks to illustrate the impact of such an interpretation on the asylum seekers the Refugee Act was enacted to protect.

As the examples described in this brief will show, the holding of the Fifth Circuit in this case has grave implications for refugees with compelling claims to protection under U.S. law, including victims of torture and former child soldiers. These examples are taken from the cases of actual asylum seekers represented by *amici* and their members, and from the reporting of the U.S. government and non-governmental organizations on human rights condi-

tions in the countries many of these refugees have fled. Ignoring the presence of duress in such cases not only distorts the statutory text, but also frustrates the legitimate purposes underlying exclusion from refugee protection by compounding the violation of rights the United States has committed itself to protect.

ARGUMENT

I. The INA's persecutor bar was phrased and intended to exclude refugees who made a moral choice to assist in the persecution of others.

This case concerns the proper interpretation of the provisions of the Immigration and Nationality Act ("INA") that require the exclusion from the protections of asylum and withholding of removal of anyone who is determined to have "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(2)(A)(i); 8 U.S.C. § 1231(b)(3)(B)(i).[1] Incorporated into the INA by the Refugee Act of 1980 ("Refugee Act"), these provisions stand as exceptions to the asylum status that derives from the INA's definition of a "refugee," and to the

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[1] The "persecutor bar" to withholding of removal presents an immaterial difference in wording, referring to the "an individual" rather than "any person." The prohibition at 8 U.S.C. § 1158(b)(2)(A)(i) also appears as an exception to the definition of a "refugee" at 8 U.S.C. § 1101(a)(42), thereby barring the resettlement in the United States under 8 U.S.C. § 1157 of persecutors of others who would otherwise be eligible for refugee status.

INA's guarantee of protection against return to persecution, both core elements of the international refugee protection regime which the Refugee Act made part of the domestic law of the United States.

As this Court has noted:

> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968.

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

The exclusion from protection of refugees guilty of very serious wrongdoing—crimes against peace, war crimes, crimes against humanity, serious non-political crimes, or acts contrary to the purposes or principles of the United Nations—is also a principle of the 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention"), and the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("Refugee Protocol"), which incorporates by reference the substantive provisions of the Convention. So too are limited exceptions to the obligation of *non-refoulement*, contained in Article 33(2) of the Convention, in the case of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who,

having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The Fifth Circuit's decision does not comport with the text or the purpose of the persecutor bar. For the reasons described in greater detail in the briefs of petitioner and of *amici* international law scholars and the United Nations High Commissioner for Refugees ("UNHCR"), the persecutor bar was intended to apply to persons who made a moral choice to assist in the persecution of others, and the INA reflects this intention. The statutory phrase "ordered, incited, assisted, or otherwise participated" itself indicates that "otherwise participated" covers forms of conduct different in form from ordering, inciting, or assisting, but equally voluntary. *See Begay v. United States*, 128 S. Ct. 1581 (2008) (provision defining a "violent felony" as a crime "that is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*" (emphasis added) excludes felony drunk driving). The concept of "persecution" itself refers to conduct objectively judged to be culpable.[2] In keeping with this, lower courts have recognized that *scienter* matters in evaluating whether a person can fairly be deemed to have assisted in the persecution of others. *Castañeda-Castillo v. Gonza-*

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[2] This does not mean that the persecutor must be motivated by a subjective animus against the victim—there are a number of common situations, including for example cases of forced religious conversion or forced marriage, where those perpetrating these abuses may understand themselves to be acting for the good of their victims. *See, e.g., Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

les, 488 F.3d 17, 20 (1st Cir. 2007) (rejecting government's argument that lack of an explicit *scienter* requirement in the statute made culpable knowledge irrelevant); *Gao v. U.S. Atty. Gen.*, 500 F.3d 93, 103 (2d Cir. 2007).

Moreover, as also argued in detail in the briefs of petitioner and other *amici*, the context of this provision as one of a series of statutory bars to protection based on serious wrongdoing, the general recognition in U.S. law that statutes that impose harsh consequences on conduct should not apply to involuntary actions, and the clear intent of Congress to conform to the Protocol, all compel the conclusion that the persecutor bar targets only those morally and criminally guilty of "acts ...so grave as to render their perpetrators undeserving of international protection as refugees." UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees ¶ 2. Even if the statute were ambiguous, the long-established precedents of this Court would require it to be interpreted in a manner consisted with international law wherever fairly possible. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 81 (1804).

The development of the concept of exclusion sprang from three main concerns: (1) to ensure that the Refugee Convention did not clash with a State's existing obligations under extradition law; (2) to avoid distorting the humanitarian image and essential objectives of asylum by allowing those who commit serious crimes and human rights violations to benefit from the protection intended for their victims;

and (3) to ensure that those who commit serious crimes are identified, removed from the refugee population, and held accountable for the harm they have caused. Lawyers Committee for Human Rights, *Refugees, Rebels, and the Quest for Justice* (2002) 10-11.[3] The refugee crises resulting from civil wars in West Africa and the aftermath of the 1994 genocide in Rwanda showed the importance of these purposes to combat impunity and to ensure the physical security of deserving refugees in situations of mass influx. *Id.* i-xxii, 1-19, 55-76.

But interpreting the persecutor bar to target refugees who acted under duress does not advance any of these objectives. Refugees who were forced to take part in violations of the rights of others under coercion, or under other circumstances that negate individual responsibility, are not proper or probable targets of the criminal law. Moreover, as the examples in this brief will illustrate, a reading of the statute that refuses to accord any legal relevance to duress leads to results that not only defy the statutory text, but put the text and purpose of the law at war with each other.

II. Refusing to recognize the legal relevance of duress means denying protection to refugees whose forced commission of human rights violations was part of the persecution they themselves suffered.

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[3] The Lawyers Committee for Human Rights was the former name of Human Rights First.

In many situations that give rise to the strongest claims of duress, being coerced into violating the rights of others is something that happens as part of—or is directly intended to be—persecution *of the person being coerced.* Yet the Fifth Circuit's decision in the present case would mean that while a person who feared being forced to take part in such illegal acts might establish a claim to protection on that basis, a refugee who had already suffered that form of persecution could be disqualified from asylum on those same grounds, without regard to the degree of coercion under which he acted.

As in the present case, many of the asylum cases in which claims of duress arise involve flight from military service or forced conscription into governmental or rebel armies. The lower courts and the BIA have recognized that a person fearing punishment for desertion or draft evasion may qualify for refugee protection where conscription would force the applicant to take part in conduct considered illegal under international standards. *See, e.g., Mekhoukh v. Ashcroft*, 358 F.3d 118. 126 (1st Cir. 2004); *Mojsilovic v. INS*, 156 F.3d 743 (7th Cir. 1998); *Ramos-Vasquez v. INS*, 57 F.3d 857 (9th Cir. 1995); *Matter of A-G-*, 19 I.&N. Dec. 502 (BIA 1987).[4]

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[4] This principle is one of the exceptions to the rule that forced conscription, or punishment for avoiding conscription, will generally not constitute persecution on account of the conscript's race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Foroglou v. INS*, 170 F.3d 68, 71 (1st Cir. 1999); *Krastev v. INS*, 101 F.3d 1213, 1217 (7th Cir. 1996).

The courts have considered this principle to apply with particular force where the targets of such illegal conduct would be people similarly situated to the applicant. *See, e.g., Islami v. Gonzales*, 412 F.3d 391, 397 (2d Cir. 2005) ("for those individuals who seek to avoid serving in a military whose brutal and unlawful campaigns are directed at members of their own race, religion, nationality, or social or political group, the requirements for stating a persecution claim are met at a significantly lower threshold of military wrongdoing"); *Vujisic v. INS*, 224 F.3d 578, 581 (7th Cir. 2000) (recognizing asylum claim of ethnic Serb born in Slovenia who fled Yugoslavia to escape serving in Serbian military because he had many Croatian, Muslim, and Slovenian friends and opposed ethnic cleansing against them).

These cases reflect an understanding of the psychological harm inherent in being forced, under circumstances of genuine coercion, to harm those one cares about. The Third Circuit made this explicit in the case of a former child soldier from Uganda, recognizing as harm rising to the level of persecution the fact that the applicant, a child conscript of the Lord's Resistance Army ("LRA"), in addition to suffering other abuses at the LRA's hands, was forced by his rebel commanders to kill a friend. *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003).

For A.K., his forced participation as a child in the Ethiopian civil war was the last chapter in a history of persecution by his own government.[5] A.K. was

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[5] The full names of the refugees whose cases are discussed here have been withheld at their request. Some have not yet been granted protection in the United States, and also fear for

first imprisoned in 1985, when he was 13 years old, after he joked about the Marxist regime of Mengistu Haile Mariam, put up posters demanding freedom for youths, and wrote an article critical of the government in a school newspaper.[6] A.K.'s family had a history of political activism; two of his close relatives were executed and his father jailed by the Mengistu regime. Later that same year, in a class on political education, A.K. questioned why students must study Marxism and complained that the Marxists were killing children by forcing them to fight his own Oromo people and the Eritreans. For expressing these thoughts, A.K. was imprisoned and repeatedly tortured.

His jailers hung him upside down, beat him on the soles of his feet, burned him, sprayed a mixture of salt and Coca-Cola on his wounds, and then forced him to walk in extreme pain on his injured feet. They deprived him of food or water as "political education instructors" tried to brainwash him. He was finally released after several months, but was rearrested and jailed after the authorities searched his home and found Western news magazines like *Time*

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the security of relatives who remain in their home countries. Most also have legitimate privacy concerns; one is still in high school. For these same reasons, the fact that a person has applied for asylum in the United States is protected from disclosure by the U.S. government under 8 C.F.R. §§ 208.6 and 1208.6.

[6] A.K. has been represented *pro bono* for close to 15 years by the law firm of Kramer, Levin, Naftalis & Frankel, LLP, on referral from Human Rights First. He resides within the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, which has not ruled on the question presented in this case.

and *Newsweek*, a short-wave radio tuned to Voice of America, and some political posters. This time A.K. was subjected to beatings that scarred his arms, buttocks, back, and legs. The Ethiopian government finally gave A.K. a "choice." He could remain in prison and continue to suffer this abuse, or he could do what he had protested against in class only a year before: be conscripted into the Ethiopian army and sent as a child soldier to the Eritrean front. Faced with these alternatives, A.K. opted for the army. He was sent straight from prison into the army without being allowed to see his family. He was then 14 years of age.

During his forced service in the Ethiopian army, A.K. and his fellow soldiers, many of them children like him, were ordered to shoot at people in civilian clothing. A.K.'s testimony makes clear that he considered all these people to be victims of the same government that had jailed and tortured him, and fired only under threat of immediate execution:

> I knew that if I did not do as I was told, I would be shot. I remember one day Tesefaye, a fifteen-year-old soldier in my brigade, refused to fire his machine gun at some Eritreans. The colonel shouted to him, "shoot them now!" Tesefaye only pretended to pull the trigger. The colonel then shot Tesefaye in the chest, and we buried him in the sand.
>
> Because I did not want to kill civilians, I hoped I would be able to escape from the army, but I was unable to do so. Those who did try to escape usually were caught

> and executed. I remember that my friend Tederos, whom I had met in the convoy that took me from Addis Ababa to Eritrea, was captured trying to escape. Army officers forced him onto a scaffold in front of two thousand soldiers. They insulted him and abused him, and asked him why he did not love his country. Then they shot him, and told us that if we tried to escape, the same thing would happen to us. I also remember what happened to ten students from Abiot Junior High School. They paid someone to help them escape, but their guide turned out to be from the army. All ten students were killed.[7]

Under these conditions, A.K. did fire his weapon along with the other soldiers, and saw people fall; it is unclear whether he himself actually hit any of them.[8]

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[7] Affidavit of A.K. in Support of his Application for Asylum (March 23, 1990) (on file with Human Rights First).

[8] Indeed, it appears that the invocation of the "persecutor bar" in his case stems in large measure from A.K.'s own repeated condemnation of the conflict he was forced to take part in and his insistence in his testimony that he saw the people on the other side—including those who may actually have been combatants—as innocent compatriots. A.K.'s status as a child at the time of these events also raises a separate set of considerations not at issue in petitioner's case but relevant to an assessment of individual culpability. These issues are discussed in Part III of this Brief.

After about three months, A.K. was wounded. His ensuing hospitalization provided him with an opportunity to flee. He arrived in this country in 1987, at the age of 15. While living in foster care, he applied for asylum and spontaneously described the facts recited above. Based on this same testimony, which the immigration court has found to be credible, the immigration judge concluded that he was barred from asylum and withholding of removal as a persecutor of others. Seventeen years and two administrative appeals and remands later, A.K.'s case is again pending before the immigration court on this same issue. Over the course of this time, A.K. has become a part of the community. He currently works full-time to support himself while completing a bachelor's degree in electrical engineering, attends a church in his area, and volunteers for local charities. But because of his brief and forced participation as a child in a conflict he abhorred, A.K. remains threatened with deportation to Ethiopia, a country that holds little for him now but painful memories, and where he continues to fear persecution based on his family's history of Oromo activism.

Forced participation in human rights violations as a form of persecution also occurs outside the context of military conscription, in many different countries and in different forms. A report on sexual violence during the recent civil war in Côte d'Ivoire notes how rebel forces forced men they were targeting for political, ethnic, and religious reasons to rape their own sisters or daughters. Those who refused were punished and even killed. Human Rights Watch, *"My Heart is Cut": Sexual Violence by Rebels*

and Pro-Government Forces in Côte d'Ivoire (August 2007), (available at http://hrw.org/reports/2007/cdi0807/). A middle-aged man described his detention by rebel forces:

> They [the rebels] asked me to sleep with my sister. And after that they put us in their vehicle and brought us to their camp. They started to beat us again. My sister was in their hands. They were doing whatever they wanted with her. They took me, they asked me to sleep with her again, publicly, and I was obliged to do it.

Id. at 32. A young woman described how rebels killed her brother in front of her for refusing to do the same thing. *Id.*

The military authorities in Burma's Chin State for a number of years forced Christian villagers to take part in the destruction of the churches, graveyards, and religious monuments of their own communities, replacing them with military camps and Buddhist pagodas often built with the forced labor of these same villagers. U.S. Dep't of State, *Burma International Religious Freedom Report* 2001.

Authorities in the People's Republic of China and Eritrea have used the relatives of those whose religious or spiritual practices the government seeks to suppress to put pressure on them to recant or cease their observance. *See* U.S. Dep't of State, *China International Religious Freedom Report* 2001 (describing how authorities have held the family members of known Falun Gong practitioners responsible for pre-

venting the spiritual practice of their relatives); U.S. Dep't of State, *Eritrea International Religious Freedom Report* 2007 (describing reports that people detained for religious reasons were required to recant as a condition for release, and that in some cases where detainees refused, their relatives were told to convince them to change their minds).

In Iraq under Saddam Hussein, authorities sought to arrest a woman who had returned to the country after years abroad. When they did not find her, they seized her brother, and made him lead them to the house where she was staying. They then arrested the woman and jailed her without charge for a month. Amnesty International, *Iraq: Victims of Systematic Repression* (Nov. 24, 1999) at 10. Given that regime's notorious use of torture and arbitrary detention against the relatives of its political targets, the brother in such a case should surely not be deemed to have "assisted or otherwise participated" in the persecution of his sister without an evaluation of the pressures under which he was acting.

Refusing to recognize the relevance of coercion in assessing the cases of refugees who were forced to take part in such abuses turns the persecution they suffered into grounds for excluding them from protection. The need to consider the same kinds of exculpatory factors that would apply to an assessment of criminal liability is particularly urgent since what is at issue in many of these cases is whether a person otherwise eligible for protection as a refugee may be returned, not to the legitimate penalties of criminal law, but to forms of harm that are condemned under

U.S. and international law due to their discriminatory motivation and, in many cases, their cruelty.

Nor is there any security justification for the government's blinkered reading of the persecutor bar. Separate statutory provisions bar from both asylum and withholding of removal any person whom there are reasonable grounds for regarding as a danger to the security of the United States. 8 U.S.C. § 1158(b)(2)(A)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv). These provisions correspond to the exception to the obligation of *non-refoulement* under Article 33(2) of the Convention in the case of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."

III. Interpreting the persecutor bar to exclude consideration of individual culpability would have a severe impact on former child soldiers.

Of the asylum claims where the persecutor bar is raised which present strong claims of duress, a number involve refugees recruited or conscripted as children into armed forces, including both government armies and rebel groups. Interpreting the persecutor bar to exclude former child soldiers from refugee protection without regard to their immaturity or to the presence of duress is contrary to the general recognition in U.S. law of the special status of children. It stands in tension with the recognition under international law that these children are victims of war crimes. It also goes against the rehabilitative focus of efforts, supported by the United States, to assist former child soldiers who are demobilized or escape

from the forces that have used them. This misinterpretation is jeopardizing the lives and futures of refugees whose experiences—illustrative of abuses widely documented in war zones around the world—demonstrate the need for an individualized assessment of culpability in applying the persecutor bar, with consideration of duress and other exculpatory circumstances.

All U.S. jurisdictions recognize that youth is a substantial mitigating factor with respect to criminal activity, and may constitute a complete defense to criminal liability. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 116 n. 12 (1982). In a more recent review of the reasons for special treatment of juveniles under the law, this Court noted that "[t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper v. Simmons*, 543 U.S. 551, 570 (2005). These same principles apply all the more strongly to children caught up in wars where their loss of "control over their immediate surroundings" is absolute, and where attempts to "escape negative influences" can result in death.

International law has long recognized the particular vulnerability of children, and has afforded them special rights and protections in situations of armed conflict.[9] In the years since A.K.'s flight to

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[9] *See* Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 U.N.T.S. 287, Art. 51 (excluding persons under 18 from enlistment or forced labor by an occupying power); Protocol Additional to the

this country, the international community has focused increased attention on the problem of the use and recruitment of children as soldiers. The recruitment or use of children under the age of 15, whether by governmental or non-governmental armed forces, is now firmly recognized as a war crime and a crime against humanity. The Rome Statute of the International Criminal Court ("I.C.C") defines "conscripting or enlisting of children under the age of fifteen years into the national armed forces or using them to participate in the hostilities" as a war crime subject to the jurisdiction of the I.C.C. Rome Statute of the International Criminal Court Art. 8(2)(b)(xxvi), U.N. Doc. A/Conf. 183/9, July 17, 1998, 2187 U.N.T.S. 90.

In 1999, the United States was one of the first countries to ratify the International Labor Organization Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, which recognizes the forced recruitment of children under the age of 18 for use in armed conflict as one of the worst forms of child labor. I.L.O 182, June 17, 1999, 38 I.L.M. 1207. The following year, the Optional Protocol to the Convention on the

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Geneva Conventions of August 12, 1949, and relating to the Protection of victims in International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 608 (providing that "children shall be the object of special respect and shall be protected against any form of indecent assault"); Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977 (extending same principle to situations of non-international armed conflict (i.e. civil war), and prohibiting use or recruitment of children under the age of 15).

Rights of the Child on the Involvement of Children in Armed Conflict (hereinafter "Optional Protocol') set 18 as the minimum age for direct participation in hostilities, prohibited the conscription (compulsory recruitment) of persons under the age of 18 by government forces, and barred non-state armed groups from recruiting or using in hostilities children under the age of 18 under any circumstances. CA Res./54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000). The United States ratified the Optional Protocol in December 2002.

The experiences of children in conflicts unfolding during this same period illustrate the urgency of these efforts, and the need for consideration of duress and other exculpatory factors in evaluating the possible exclusion from protection of any refugee.

K.S., for example, was nine years old and playing soccer after school in Sierra Leone when rebel soldiers from the Revolutionary United Front ("RUF") seized him and his playmates around the same age.[10] This was the beginning of K.S.'s ordeal as a child soldier of the RUF. About a month after his abduction, K.S. tried to escape, but was caught. The rebels held him down and branded his upper arm with a hot iron. The other children they had captured were made to watch, as a warning of what would happen to them if they tried to run away. The rebels told K.S. that if he tried to escape again, they would cut off his arm.

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[10] K.S. is represented the law firm of Mayer Brown LLP, on referral from the National Immigrant Justice Center. The facts that follow are taken from his application for asylum and the extensive testimonial and country conditions evidence submitted in support thereof.

They later slashed his hands and chest with a razor, and did the same to the other conscripts, as a means of forever identifying them to other Sierra Leoneans as having been part of the RUF. They burned K.S. with cigars for minor infractions, beat him over the head with their guns, kicked him, and hit him.

Still just a child, K.S. was witness to terrible violence: he saw the rebels shoot and kill children who failed to follow orders, saw the rebels shoot and kill his best friend for refusing to shoot a man, and saw the extreme brutality inflicted by the RUF on the civilian population of Sierra Leone. The RUF deliberately used drugs to desensitize the children in their command, neutralize their terror, and increase their dependence. Under these conditions, K.S. was made to take part in what he and the government agree were atrocities. K.S. continues to suffer terrible guilt and sadness and recurring nightmares about the things he was forced to do.

K.S. was finally freed by U.N. forces. He had lost all sense of time while with the RUF. It was only when he was told the date that he realized he was 13 years old and had spent about four years in rebel captivity. Most of K.S.'s immediate family had been killed in the war. Unsure where to turn and fearing that he would become a target of retribution based on his status as former child soldier, K.S. fled first to Guinea and then to Senegal. Finding no security in either country, he stowed away on a ship that brought him to the United States, where he asked for asylum. Still a minor at the time of his arrival, he was first placed in a children's home and then with a foster family to whom he has grown close. He is now

an avid reader and a dedicated student at his high school, and despite having lost so many years of schooling, is on track to graduate with his class. He continues to struggle with the trauma of his past and with his feelings of shame and remorse.

K.S.'s application for asylum is currently pending before the immigration court, where the Department of Homeland Security ("DHS"), citing to the Fifth Circuit's decision in *Bah v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003), and to this Court's decision in *Fedorenko v. U.S.*, 449 U.S. 490 (1981), has taken the position that he is statutorily barred from refugee protection for having assisted in the persecution of others. DHS argues that "[t]he persecutor bar applies to any person, regardless of age because it omits any reference to the age of the perpetrator." Government's Pre-Trial Brief in the case of K.S. (on file with Human Rights First).

Children have suffered variants on K.S.'s nightmare in some of the world's worst zones of conflict. The recruitment and use of children as soldiers is by no means a new phenomenon. Since the end of the Cold War, however, the changing nature of armed conflict combined with the easy availability of light weapons physically usable by children has contributed to a significant increase in the exploitation of children as soldiers. UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (December 2003) at 7. Both boys and girls are used, both in combat and in support roles. Girls in particular are often also exploited as sex slaves by older combatants. While the civil wars in West Africa were notorious for their use of children, this

abuse has been a serious problem in ongoing conflicts in countries including Burma, Chad, Colombia, the Democratic Republic of the Congo, Somalia, and Sudan. Coalition to Stop the Use of Child Soldiers, *Summary Child Soldiers Global Report 2008* (available at http://www.childsoldiersglobalreport.org/files/country_pdfs/FINAL_2008_Global_Report.pdf.)

Child recruits accused of the slightest infractions may be subject to extreme physical punishments. Their involuntary drugging or intoxication by their commanders has also been a common feature of several conflicts where child soldiers have been used in large numbers. Human Rights Watch, *Coercion and Intimidation of Child Soldiers to Participate in Violence* at 1 (April 2008) (available at http://hrw.org/backgrounder/2008/crd0408/). Some children are forced to take part in atrocities against their own families or communities in order to stigmatize them and prevent them from returning home. The use or threat of violence to compel child recruits to harm other fighters and to commit human rights violations against civilians is geographically widespread and common to government armies, paramilitaries, and armed opposition groups. *Id.* at 2. These practices, in themselves damaging to children, could also, under the Fifth Circuit's holding in this case, prevent former child soldiers forced to take part in such abuses from finding protection against the persecution they fear themselves.

E.O., a citizen of Uganda, became a child soldier of the Lord's Resistance Army ("LRA") at the age of 11, after the LRA attacked his village, burned down

his home, and kidnapped his family.[11] He was made to join in armed raids against villagers who were members of his own Acholi ethnic group and to take part in abuses against civilians. He was 13 when he escaped from the LRA, and fled to the United States soon afterwards. The immigration judge who heard his case, applying the Eighth Circuit's decision in *Hernandez v. Reno,* 258 F.3d 806 (8th Cir. 2001), determined that application of the persecutor was inappropriate, noting that "[w]e are talking about acts carried out by an 11- to 13-year-old," and referring also to the LRA's well-documented use of extreme violence against its own child soldiers. *Matter of E.-O.-*, I.J. at 17. The BIA upheld this decision against a DHS appeal, holding that "because the respondent was a boy between the ages of 11 and 13 during the relevant period, we are not persuaded that he had the requisite personal culpability for ordering, inciting, assisting, or otherwise participating in the persecution of others."[12] BIA Dec. in *Matter of E.-O.-* (on file with Human Rights First).

Several of the former child soldiers described here committed acts of violence at very young ages

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[11] E.O. was represented by Julia M. Morgan of the Hennepin County Office of Multi-Cultural Services in Minneapolis, Minnesota.

[12] DHS had also raised the separate "national security" bar in E.O.'s case. 8 U.S.C. § 1158(b)(2)(A)(iv); 8 U.S.C. § 1231(b)(3)(B)(iv). The immigration judge rejected this, stating: "There is just nothing in the record that would indicate that the respondent has engaged in any activities in the United States that would cause him to be a security risk. He apparently has been a good student and is liked at his school. He has participated in Job Corps and h[illegible] had no criminal record in the United States." I.J. at 18. DHS dropped this claim on appeal.

under forms of duress few adults would have been able to withstand. As both the Immigration Judge and the BIA intimated in E.O.'s case, however, cases involving children often raise other issues in addition to duress, including a lack of *mens rea*. Children often lack the intellectual and political background to place their actions, and the actions of the forces that exploit them and target others, in broader context. They will then lack the capacity to distinguish ordinary civil strife from persecution, or to critically evaluate a commander's claim, for example, that all their targets are enemy guerrillas.

These age-based deficiencies are precisely what make children attractive as soldiers to armies that seek to violate the laws of war without question or interference. *See* U.N. Secretary-General, Report of the Expert of the Secretary-General, Ms. Graça Machel, on Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, ¶ 34, delivered to the General Assembly, U.N. Doc. A/51/306 (Aug. 26, 1996). This problem is exacerbated and prolonged by the fact that children, once recruited or conscripted, are generally made to live under conditions that hamper their physical, moral, and intellectual development. *Id.* ¶¶ 44-47.

These circumstances must be considered in assessing the culpability of former child soldiers, as has been done in the criminal context in countries that might have been tempted to ignore them. In Sierra Leone, a country which suffered terribly at the hands of child combatants, the national government stated while hostilities were still ongoing that it did not intend to prosecute child soldiers. William O'Neill,

Conflict in West Africa: Dealing with Exclusion and Separation, 12 IJRL Special Supplementary Issue on Exclusion 171, 181 (2000) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916141). After the end of the war, the prosecutor of the Special Court for Sierra Leone made the same decision, stating that the objective of his office was "to prosecute the people who forced thousands of children to commit unspeakable crimes." Office of the Prosecutor, Special Court for Sierra Leone, Press Release: Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002) (available at http://www.sc-sl.org/press-otp.html.).[13] The Appeals Chamber of the Special Court later concluded that the prohibition on the recruitment or use of children under the age of 15 was already recognized under customary international law during the period when the military leaders on trial before the Special Court had been using them. Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) in *Prosecutor v. Sam Hinga Norman* (Case No. SCSL-2004-14-AR72(E)).

As this Court has noted in the criminal context, "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. Consistent with this understanding,

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[13] Set up jointly by the Government of Sierra Leone and the United Nations, the Special Court for Sierra Leone is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone since November 30, 1996.

the United States has contributed over $10 million through the U.S. Agency for International Development "to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society." Initial Report of the United States of America to the U.N. Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. CRC/C/OPA/USA/1 (June 22, 2007). Many of the former child soldiers affected by the government's interpretation of the persecutor bar vividly illustrate through their new lives in this country the value of such a rehabilitative approach.

While the exact number of current and former child soldiers worldwide is unknown but generally agreed to be large, only a very small fraction find their way into the U.S. refugee protection system. But for those who do, it is critical that their status as children at the time of their involvement in armed conflict and the presence of duress be taken into account in any consideration of the application of the persecutor bar.

IV. A rule holding duress to be irrelevant to the application of the persecutor bar would have particularly perverse effects on victims of torture.

If the involuntariness of a person's actions is *irrelevant* to whether or not he can be said to have "assisted or otherwise participated" in the persecution of others, what does this mean for refugees who were forced under torture to denounce others? Torture is

the ultimate form of duress, and is absolutely prohibited under U.S. and international law. The United States was an early proponent of the Convention Against Torture and actively participated in its drafting. United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; *see* S. Exec. Rep. No. 101-30, at 2. The Convention Against Torture codified the long-established *jus cogens* norm absolutely prohibiting torture, and aimed actually to prevent and punish this form of abuse, through provisions the United States has incorporated into domestic legislation. 18 U.S.C. §§ 2340-2340A; Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-227, Div. G, Tit. XXII, § 2242, 112 Stat. 2681, 2681-761, 2681-822.

In view of this, does the government believe that refugees who broke under torture and were made to provide information whose "objective effect" was to lead to the persecution of others should be excluded from protection under the Fifth Circuit's rule? [14]

The use of torture as an means of interrogating and punishing political opponents, a notorious feature of the totalitarian regimes in whose shadow the Refugee Convention came into being, was still taking

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[14] This phrase, taken from the BIA's decision in *Matter of Fedorenko*, 19 I. & N. Dec. 57, 69 (BIA 1984), and repeated in its later decision in *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 814-15 (BIA 1988), appears nowhere in this Court's *Fedorenko* decision, but has been invoked to negate the relevance of voluntariness in persecutor bar determinations.

place during the period when the U.S. incorporated its treaty obligations towards refugees into domestic legislation.

On August 1, 1982, José Eduardo Becerra Lanza, a medical student and student leader in Honduras, was abducted by agents of the Honduran Directorate of National Intelligence (DNI). DNI had previously arrested and detained one of his fellow student activists. Under torture, this student reportedly named Becerra Lanza as an active student leader with whom he worked. When the other student was then released, he warned Becerra Lanza that DNI had asked about him, and urged him to leave the country. Human Rights Watch et al., The Facts Speak for Themselves: The Preliminary Report of the National Commissioner for the Protection of Human Rights in Honduras (1994) 140-141. Becerra Lanza was subsequently abducted by DNI agents and never seen again.

If the other student had sought asylum in the United States—as a number of student activists from Honduras did during that period—what would have been his fate under the Fifth Circuit's rule? Assuming that his disclosure of Becerra Lanza's name led to the latter's arrest and presumed death—as he clearly feared it would—it warps the meaning of the persecutor bar to suggest that he could be considered to have "assisted in the persecution" of his fellow student. Notwithstanding its "objective effect," the fact that he made this disclosure under torture cannot be legally irrelevant, nor can the fact that he attempted to prevent the harm he feared he would ensue.

The use of torture to extract information has been a feature of official repression in a number of other countries that have forced their citizens to seek the protection of other states. Between October 1990 and January 1991, for example, the government then in power in Mauritania arrested as many as 3,000 black Mauritanians on the accusation that they were involved in an alleged coup attempt. These abuses were part of an organized campaign of what later became known as "ethnic cleansing," in which tens of thousands of black Mauritanians were forcibly expelled from their country. Human Rights Watch, *Mauritania's Campaign of Terror: State-Sponsored Repression of Black Africans* (April 1994), 58-59. Between 500 and 600 of those arrested were executed or tortured to death. They were tortured to extract confessions and information about others. A black officer stationed at one of the main military detention centers, who was also briefly detained, subsequently sought asylum in France and described what he had witnessed:

> I saw many cases of torture. A Lieutenant Baal, in December, for one. He was a pilot in the air force. I knew him for years. When I saw someone sleeping—I didn't even recognize him. They had beaten him for fifteen minutes with rubber tubing and stripped him naked. He had his arms spread and attached, also his legs. A cord was attached to his neck. They beat him on his chest and his genitals. There was blood flowing

> from his mouth. He screamed. Finally he said he was part of the coup and had arms hidden at his home. They walked on him and threatened to rape his wife. The torture lasted for more than two hours. They said, "You give us names of other officers with you." Then they sent a message to the army to check his house for arms—but they found no arms or anything at all. So they called him back. They began to beat him but realized that there was no point. He signed a confession.

Id. at 64.

Information obtained under such circumstances served as the basis for further arrests, including that of a military doctor who described himself as apolitical but was told he had been "denounced by others who had been arrested." *Id.* at 67. The U.S. Department of State reported that following a round-up of members of the political opposition, the "security forces apparently used confessions forced from persons they initially detained to arrest still more." The State Department noted the following example:

> Ali Ould Vill, an auto mechanic, claimed to have been tortured at the police station in El Mouteverjirat at Nouadhibou. Two newspapers printed testimony by Vill in which he claimed that police officers forced him to disrobe and to lie on the ground. He was then kicked and beaten while his captors in-

> sisted that he sign a statement incriminating certain [opposition party] leaders in the January 26 violence. When he refused, claiming he was not a [party] member and did not know the leadership, police forced hot peppers into his eyes and body openings. Vill signed a statement which was later used as a justification for a wave of arrests that took place the following day.

U.S. Dep't of State, *Mauritania: Country Reports on Human Rights Practices 1991* (Jan. 30, 1992) at 164.

Similar practices were notorious in Saddam Hussein's Iraq, where a man arrested in the wake of unrest in 1999 was accused by a friend, under torture, of being involved in the murder of the head of the Saddam Security Directorate. He himself then "confessed" to this killing under torture. Although the details of his "confession" convinced his interrogators that he was not in fact involved, they continued to hold him without trial and tortured him further to extract from him information about political opponents of the regime. *See* Amnesty International, *Iraq: Systematic Torture of Political Prisoners* (2001) at 5-6.

Some of the survivors of these abuses sought—and were granted—asylum in other countries, including the United States. Under the Fifth Circuit's holding in this case, what would the government propose to do with Ali Ould Vill if he were to seek protection in the United States today?

This is not an academic question. The use of torture to force denunciations of political opponents is ongoing at the time of this writing, in countries that even now are driving some of their citizens to flee to the United States for safety. A Zimbabwean man active in the Movement for Democratic Change ("MDC"), the main political opposition to President Robert Mugabe and the ruling Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), recently described his experience of torture in the aftermath of that country's elections in March 2008. He was handcuffed and beaten for an entire night with iron rods, barbed wire, and logs. He explained: "I was then ordered to give them all the names of MDC polling agents and I did because I feared for my life." Human Rights Watch, *"Bullets for Each of You": State-Sponsored Violence Since Zimbabwe's March 29 Elections* (June 2008) at (available at http://hrw.org/reports/2008/zimbabwe0608/)

Villagers described a "re-education" meeting organized by Mugabe supporters on May 5, 2008, at which over 70 villagers were beaten and tortured, leaving six of them dead:

> The ZANU-PF supporters also had a list of about 20 MDC activists who they called out. They proceeded to beat these people and demand that they each reveal the names of at least five other activists. In pain, the victims would shout out the names of any people and they too would be called out and beaten.
>
> The ZANU-PF youths and supporters would bring forward three or four people at a time. They tied the legs of the

> victims and handcuffed their hands, before forcing them to lie prone on their stomachs. Three ZANU-PF youths with thick sticks would stand on either side of the victim and take turns beating the victims on the back, back of the legs and buttocks. The ZANU-PF youths and supporters either stripped the women naked or down to their underwear before beating them. In some incidents the perpetrators tied barbed wire around the genitals of the men and tied the other end of the wire around logs. The perpetrators then forced the men to use their genitals to pull the logs as they continued to beat them. Several men sustained serious injuries to their genitals as a result.

Id. at 36-37.

What will happen to the survivors of these events if they seek the protection of the United States? There is no basis in the statute, or in the treaty that statute sought to implement, for a rule that would exclude victims of torture from refugee protection based on what they did or said under circumstances like these.

CONCLUSION

Amici urge that the decision of the Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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JUNE 2008

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-499

IN THE

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MICHAEL B. MUKASEY,

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BRIEF FOR SCHOLARS OF INTERNATIONAL REFUGEE LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Immigration and Nationality Act bars granting asylum or withholding of removal to a person who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

The question presented is whether those "persecutor bars" apply to a person whose allegedly disqualifying conduct was coerced.

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INTEREST OF THE *AMICI CURIAE*

Amici are legal scholars who have studied and published on the status and rights of refugees under U.S. and international law, on exclusion from refugee status, and on international criminal law. *Amici* have a strong interest in ensuring that U.S. law is interpreted in a manner consistent with the international obligations of the United States. *Amici* further have a strong interest in ensuring that States adhering to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol do not apply those instruments in contradictory ways, but rather give them full and consistent ef-

fect with respect to all persons who seek refuge within their borders. This Court has previously consulted the conclusions of leading scholars interpreting those instruments. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439-440 & n.44 (1987); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 182 (1993).[1]

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[1] This brief is accompanied by letters from each party consenting to its filing. No counsel for any party authored this brief in whole or in part; no party or counsel for any party made any monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici* and their counsel made any such monetary contribution.

the Global Consultation paper on Exclusion from Refugee Status for the fiftieth anniversary of the 1951 Convention. He has served as an advisor to the UNHCR, the Organization for Security and Cooperation in Europe, and the Council of Europe in matters of refugee law, terrorism, and human rights.

Guy S. Goodwin-Gill is Founding Editor of the *International Journal of Refugee Law* and author (with Jane McAdam) of a leading treatise in refugee law, *The Refugee in International Law* (3d ed. 2007). Professor Goodwin-Gill is currently a Senior Research Fellow at All Souls College and Professor of International Refugee Law at the University of Oxford. He is a scholar of public international law, with a particular interest in immigration, refugees and asylum, human rights, and international humanitarian law. Professor Goodwin-Gill's other books include *Child Soldiers: The Role of Children in Armed Conflict* (1994) (with Ilene Cohn). He has been regularly cited by the highest courts of several jurisdictions, including this Court in prior refugee law cases.

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cluding the House of Lords, the Supreme Court of Canada, and the High Court of Australia.

David A. Martin is coauthor of leading casebooks in the field of immigration and refugee law: *Immigration and Citizenship: Process and Policy* (6th ed. 2008), and *Forced Migration: Law and Policy* (2007). Professor Martin is the Warner-Booker Distinguished Professor of International Law at the University of Virginia School of Law. He served as General Counsel of the U.S. Immigration and Naturalization Service from 1995 to 1998. Professor Martin has also advised the U.S. government in immigration and refugee matters, including a 1993 Department of Justice consultancy that led to major reforms of the U.S. asylum system and a 2003-2004 Department of State study on improving the U.S. overseas refugee admissions program.

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SUMMARY OF THE ARGUMENT

The Immigration and Nationality Act (INA) allows persons to seek refuge in the United States if they fear persecution in their home country on account of race, religion, nationality, membership in a particular social group, or political opinion. An applicant who meets the above standard—known as a "refugee" (8 U.S.C. § 1101(a)(42)(A))—may seek a discretionary grant of asylum (*see id.* § 1158(b)(1)(A)) and may also be eligible for a mandatory withholding of removal (*see id.* § 1231(b)(3)).

Asylum, withholding of removal, and the U.S. refugee definition are each subject to "persecutor bars," which foreclose relief to applicants who, though facing persecution themselves if removed, previously "ordered, incited, assisted, or otherwise participated in" persecution of others on account of one of the protected grounds. 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i).

In this case, both the Board of Immigration Appeals (BIA) and the court of appeals held that the "persecutor bars" forbid a grant of asylum or withholding of removal even if the applicant's conduct was the result of coercion. The BIA held that "an alien's motivation and intent are irrelevant to the issue of whether he 'assisted' in persecution.... [I]t is the objective effect of an alien's actions which is controlling." Pet. App. 6a (internal quotation marks omitted). The court of appeals likewise held that "whether an alien was compelled to assist authorities is irrelevant." *Id.* 2a.

The decisions below erred in two respects. First, they failed to give meaning to the words "ordered, incited, assisted, or otherwise participated in," all of

which incorporate concepts of criminal culpability and exculpatory defenses.

Second, the BIA ignored Congress's intent that the persecutor bars conform to the United States' obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267, which incorporates most of the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The INA's persecutor bars parallel the exclusion in Article 1F(a) of the Convention, which makes clear that individual culpability is highly relevant—and indeed must be established—before a person facing persecution may be denied safe haven. The practice of other States Parties to the Refugee Protocol and Convention uniformly recognizes a duress defense to the persecutor exception. The Convention's drafting history and the well-established norms of international criminal responsibility that the Convention incorporates by reference similarly require consideration of duress.

The Refugee Protocol—and therefore, the INA—requires at a minimum that an applicant not be subject to the persecutor bars where (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; and (c) the remedy was not disproportionate to the evil. The Protocol and the INA may also provide greater protection, but even this minimum standard requires reversal of the court of appeals' judgment in this case, which did not permit consideration of culpability at all.

ARGUMENT

I. THE INA'S "PERSECUTOR BARS" REQUIRE CONSIDERATION OF INDIVIDUAL CULPABILITY AND THE DEFENSE OF DURESS

This case turns on the interpretation of three virtually identical sections of the INA that forbid treating as a "refugee"—and relatedly bar from asylum and withholding of removal—anyone who (1) "ordered, incited, assisted, or otherwise participated in" (2) "the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §§ 1101(a)(42) (refugee definition), 1158(b)(2)(A)(i) (asylum), 1231(b)(3)(B)(i) (withholding of removal).[2]

A. The Plain Text Of The INA's Persecutor Bars Requires Consideration Of Individual Culpability And Well-Established Exculpatory Defenses

As with any statute, interpretation of the INA begins with its text. The words "persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" track language in the general eligibility provisions governing asylum and withholding of removal. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). "[P]ersecution ... on account of" a protected ground has thus been interpreted consistently across the eligibility

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[2] In a slight and immaterial variation, the withholding provision excludes applicants who have "ordered, incited, assisted, or otherwise participated in the persecution of *an individual because of the individual's* race, religion, nationality, membership in a particular social group, or political opinion" (emphasis added).

and persecutor bar provisions. *See, e.g., Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811, 815 (BIA 1988) (citing interpretations of the refugee definition's "on account of" element in applying a persecutor bar); *Matter of Fuentes*, 19 I. & N. Dec. 658, 661-662 (BIA 1988) (declining to construe "persecution" broadly for eligibility purposes because it would expand the persecutor bar); *see also Jiang* v. *BCIS*, 520 F.3d 132, 135-136 (2d Cir. 2008) (vacating BIA decision and noting as "troubling" the BIA's treatment of particular conduct as "persecution" under the persecutor bar but not as "persecution" under eligibility provisions).

To implicate the persecutor bars, however, it is not enough that "persecution" for a protected reason have occurred. The applicant must additionally have "ordered, incited, assisted, or otherwise participated in" the persecution. *E.g.*, 8 U.S.C. § 1101(a)(42). These words distinguish the persecutor bars markedly from the eligibility provisions governing asylum and withholding of removal, which do not turn on whether an individual actor could be said to have "ordered, incited, assisted, or otherwise participated in" the harm in question. Thus, while an asylum applicant may demonstrate a well-founded fear of "persecution" without proving the culpability or subjective intent of the person who harmed him, application of the "persecutor bars" requires more.[3]

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[3] The purpose of the U.S. and international refugee protection regimes is to provide protection, not to punish or rebuke. *See, e.g.*, Hathaway, *The Rights of Refugees Under International Law* 4-5 (2005); Anker, *Law of Asylum in the United States* 284 (3d ed. 1999). The focus of refugee law is thus on the predicament of the person facing persecution, who is not required to establish the culpability or subjective intent of those committing the harm. *See,*

The BIA decision below, which considered only the objective existence of "persecution," effectively read the additional language out of the persecutor bar provisions. This Court has long recognized the duty to "'give effect, if possible, to every clause and word of a statute.'" *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883)); *see also Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

The additional words in the persecutor bars incorporate concepts of individual culpability that, at a minimum, require consideration of intent and related exculpatory defenses. Two of the additional verbs—"ordered" and "incited"—call for an overt manifestation

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e.g., *Pitcherskaia* v. *INS*, 118 F.3d 641, 647 (9th Cir. 1990) ("That the persecutor inflicts the suffering or harm in an attempt to elicit information, for his own sadistic pleasure, to 'cure' his victim, or to 'save his soul' is irrelevant.... Motive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her 'on account of' a characteristic or perceived characteristic of the alien." (internal citations and footnote omitted)); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365-367 (BIA 1996) ("[M]any of our past cases involved actors who had a subjective intent to punish their victims. However, this subjective 'punitive' or 'malignant' intent is not required for harm to constitute persecution." (citing *Matter of Kulle*, 19 I. & N. Dec. 318 (BIA 1985), and *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985))); *see generally* Anker, *Law of Asylum in the United States* 281-285 (discussing subjective intent and its relationship to the eligibility provisions' requirement of persecution "on account of" a protected ground).

of intent. *See Black's Law Dictionary* 777, 1129 (8th ed. 2004) (defining "order" as "command" and "incite" as "[t]o provoke or stir up (someone to commit a criminal act, or the criminal act itself). Cf. abet."). The notion of having "assisted" in a wrongful act similarly correlates with the criminal law. *See* 18 U.S.C. § 2(a) (providing criminal liability for "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission"); *Central Bank, N.A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994) ("aiding and abetting" is generally understood as providing knowing aid to persons committing a wrongful act with the intention of facilitating the act); *United States* v. *Williams*, 341 U.S. 58, 64 (1951) ("aiding and abetting" means to assist in perpetration of a crime). By the principle of *ejusdem generis*, the "otherwise participated" language in the persecutor bars should also be understood to require *culpable* participation. Indeed, the BIA has already invoked principles of criminal and accessorial liability in determining that an applicant "participated in the persecution of others." *Matter of McMullen*, 19 I. & N. Dec. 90, 96 (BIA 1984) (noting that the Charter of the International Military Tribunal extended criminal liability to "accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes" and that the applicant's voluntary assistance to a terrorist organization made him complicit in its acts (internal quotation marks omitted)).

The criminal law concepts invoked in the INA's persecutor bars thus require adjudicators to look beyond the objective effect of conduct and to consider culpability. *See, e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 274 (1952) ("'It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt

there must be not only a wrongful act, but a criminal intention.'" (quoting *People* v. *Flack*, 125 N.Y. 324, 334 (1891))). Consideration of culpability also incorporates common defenses to criminal liability, including duress. *Cf. Dixon* v. *United States*, 548 U.S. 1, 12-13 & n.7 (2006) (noting that even absent codification of affirmative defenses, the Court has assumed their availability when interpreting federal criminal statutes). The INA's persecutor bars should accordingly be construed to include such a defense.

B. The Persecutor Bars Must Be Read Consistently With U.S. Obligations Under The Refugee Protocol

The requirement of culpability and availability of a duress defense are confirmed when one "'look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Dada* v. *Mukasey*, 2008 WL 2404066, at *9 (U.S. June 16, 2008) (quoting *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)); *see also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)).

The "persecutor bars" at issue here, enacted as part of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, are inextricably linked to, and must be interpreted in light of, the United States' obligations under two important international instruments. *See* United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 ("Refugee Protocol"); United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("Refugee Convention").

Following the humanitarian crisis of the Holocaust and the Second World War, the Member States of the United Nations drafted the Refugee Convention to ensure that persons facing persecution in their home countries could find refuge elsewhere. The Convention defined "refugee" as, *inter alia*, a person who:

> [a]s a result of events occurring before 1 January 1951[4] and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Convention art. 1A(2).

The Convention obligated States Parties to afford refugees certain protections, the most important of which is *nonrefoulement*,[5] which is "[a] refugee's right not to be expelled from one state to another ... where his or her life or liberty would be threatened." *Black's*

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[4] The Convention allowed State Parties to interpret "events occurring before 1 January 1951" to mean either "events occurring in Europe before 1 January 1951" or "events occurring in Europe or elsewhere before 1 January 1951." Art. 1B.

[5] "*Nonrefoulement*" derives from the French verb "*refouler*," meaning "to drive back." *See* Goodwin-Gill & McAdam, *The Refugee in International Law* 201 (3d ed. 2007); Hathaway, *The Rights of Refugees Under International Law* 349.

Law Dictionary 1083; *see also* Refugee Convention art. 33(1) ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179-180 (1993) (discussing *nonrefoulement*).

In 1967, the Refugee Protocol expanded the Convention's protections by incorporating Articles 2 through 34 of the Convention by reference and striking the geographic and temporal restrictions from its definition of "refugee." Refugee Protocol art. 1(1)-(3). Although the United States did not sign the Refugee Convention itself, it acceded to the Protocol in 1968 and, by doing so, obligated itself to recognize qualified persons as refugees and "to comply with the substantive provisions of Articles 2 through 34 of the [Refugee Convention]." *INS* v. *Stevic*, 467 U.S. 407, 416 (1984).

Congress enacted the Refugee Act of 1980 specifically to comply with the United States' obligations under the Convention and Protocol. In *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1986), the Court observed that there is "abundant evidence" that one of Congress's primary purposes in passing the Refugee Act "was to bring United States refugee law into conformance with the [Protocol]." *Id.* at 432, 436-437; *see also INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). Indeed, Congress transcribed the Convention's definition of "refugee" into the Act with only minor variations and modified the remedy of "withholding of deportation"—now known as "restriction on removal" (8 U.S.C. § 1231(b)(3)) or "withholding of removal" (8 C.F.R. § 208.1(a))—to comply with the United States' Convention obligation of *nonrefoulement*. *See Cardoza-*

Fonseca, 480 U.S. at 429 & n.7, 440-441; *Stevic*, 467 U.S. at 421 ("Section 203(e) of the Refugee Act of 1980 amended the language of [the withholding of deportation provision], basically conforming it to the language of Article 33 of the United Nations Protocol.").

Legislative history further confirms Congress's intent that the Refugee Act comport with the Protocol. Both the House and Senate committee reports, as well as the conference committee report accompanying the final Act, contain statements that the Act's provisions are intended to conform to the Protocol. *See* H.R. Conf. Rep. No. 96-781, at 19-20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160-161 (adopting the "internationally-accepted definition of refugee contained in the U.N. Convention and Protocol" and noting that the withholding of removal provision is to be "construed consistent with the Protocol"); H.R. Rep. No. 96-608, at 9-10 (1979) (stating that the Act will "finally bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the [Convention and Protocol]" and noting that the Act's persecutor bar "is consistent with the U.N. Convention"); S. Rep. No. 96-256 at 4, 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144, 149 (stating that the Act's refugee definition "will bring United States law into conformity with our international treaty obligations" and provide relief "to those who qualify under the terms of the United Nations Protocol"); *see generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981); Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 Mich. Y.B. Int'l Legal Stud. 91.

In addition to voicing a general intent that the Refugee Act conform to the Protocol, Congress also indicated that the persecutor bars at issue here be inter-

preted consistently with the corresponding provisions in the Refugee Convention. The Convention's Article 1F specifies particular people who, though they may otherwise qualify as "refugees," cannot avail themselves of the protection of that status:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

The first version of the Refugee Act to contain the persecutor bar as a limitation on the definition of "refugee" was a House Judiciary Committee amendment that was later adopted by the full House. *See* 125 Cong. Rec. 37198, 37199 (1979) (quoting H.R. 2816, 96th Cong., § 201(a) (1979), as amended). The Judiciary Committee described the statutory bar as embodying the same exception "provided in the Convention relating to aliens who have themselves participated in persecution." H.R. Rep. No. 96-608, at 18. The Judiciary Committee specifically quoted Article 1F(a) of the Convention:

> The Committee Amendment also adds language specifically to exclude from the definition of "refugee" those who themselves engaged in persecution. This is consistent with the U.N. Convention (which does not apply to those who,

> *inter alia*, "committed a crime against peace, a war crime, or a crime against humanity"), and with the two special statutory enactments under which refugees were admitted to this country after World War II, the Displaced Persons Act of 1948 and the Refugee Relief Act of 1953.

Id. at 10.[6] The House's amended withholding of deportation provision also had a persecutor bar, which was worded identically to the bar in the definition of "refugee." *See* 125 Cong. Rec. 37200 (quoting H.R. 2816, 96th Cong., § 203(e), as amended).

In drafting the final version of the Act, the Conference Committee adopted the House bill's definition of "refugee" and its withholding of deportation provision. *See* H.R. Conf. Rep. No. 96-781 at 19-20, *reprinted in* 1980 U.S.C.C.A.N at 160-161. The Conference Committee specifically observed that the House bill "incorporated the U.N. definition" of "refugee." *Id.* at 19, *reprinted in* 1980 U.S.C.C.A.N at 160. With regard to the withholding provision and its exceptions, the Conference Committee adopted the House version "with the understanding that it is based *directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol.*" H.R. Conf. Rep. No. 96-781 at 20, *reprinted in* 1980 U.S.C.C.A.N at 161 (emphasis added).

The final Refugee Act accordingly provided for "four specific conditions" under which an otherwise-

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[6] The Committee's observation that the persecutor bar "is consistent with the U.N. Convention ... and with ... the Displaced Persons Act of 1948" was prior to this Court's interpretation of the 1948 Act exclusion clause in *Fedorenko* v. *United States*, 449 U.S. 490 (1981).

qualified applicant could be deported notwithstanding the principle of *nonrefoulement*—grounds that match "those set forth in the aforementioned international agreements." H.R. Conf. Rep. No. 96-781 at 20, *reprinted in* 1980 U.S.C.C.A.N at 160-161. The first exclusion in the Act was the persecutor bar at issue here (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(A))), which corresponds to the Convention's exclusion for persons who "committed a crime against peace, a war crime, or a crime against humanity." *See* H.R. Rep. No. 96-608, at 10; Refugee Convention art. 1F(a). The other three exclusions also derive from the Convention: "danger to the community" following conviction of "a particularly serious crime" (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(B)); Refugee Convention art. 33(2)); "serious reasons for considering that the alien has committed a serious nonpolitical crime" outside the United States prior to the alien's arrival (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(C)); Refugee Convention art. 1F(b)); and "reasonable grounds for regarding the alien as a danger to the security of the United States" (Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(D)); Refugee Convention art. 33(2)). The Refugee Act thus incorporated both the Convention's Article 1F and its Article 33(2) exclusions from protection. Although the structure and wording of the Refugee Act and the Refugee Convention do not always match, the congruence of their provisions is evident.[7]

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[7] The Act did not specifically reference persons "guilty of acts contrary to the purposes and principles of the United Nations." Refugee Convention art. 1F(c). Congress may have considered it sufficiently covered by the persecutor bars at issue in this case. *See* Refugee Act § 203(e) (adding 8 U.S.C. § 1253(h)(2)(A)). Indeed, when pointing out the persecutor bars' consistency with the

In addition to the "abundant evidence" in its legislative history, the Refugee Act's conformity with the Protocol is further confirmed by the rule presuming that acts of Congress are consistent with U.S. treaty obligations. Courts do not interpret statutes to repudiate U.S. treaty obligations absent a clear statement by Congress manifesting such an intent. *See Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252

Convention, the House report noted that the Convention did not apply to persons who, "*inter alia*," committed a crime against peace, a war crime, or a crime against humanity as provided in Article 1F(a). H.R. Rep. No. 96-608, at 10. The report's use of "*inter alia*"—considered in view of the Convention's structure and the other exclusions specified in the Refugee Act—suggests that Congress may have meant the persecutor bars to encompass both Articles 1F(a) and 1F(c). Alternatively, "*inter alia*" may have simply been a rhetorical reference to other exclusions.

For purposes of this case, it does not matter whether the Refugee Act's persecutor bar covered Article 1F(c) as well as 1F(a) since, as discussed below (pp. 22-24), both articles require consideration of personal culpability. Moreover, the text, drafting history, and state practice strongly suggest that Article 1F(c) is either coterminous with Articles 1F(a) and 1F(b), or can apply independently only to (1) state officials in positions of authority (and under some interpretations only those in the highest position of policy-making or executive authority), (2) individuals with a high degree of involvement in serious human rights violations, and (3) persons who commit terrorism-related acts (which could also be a basis of exclusion under Articles 1F(a), 1F(b), or 33(2) of the Convention). *See* Goodwin-Gill & McAdam, *The Refugee in International Law* 189-190 (reviewing the drafting history of Article 1F(c) together with the practice of States Parties and relevant U.N. instruments); Hathaway, *The Law of Refugee Status* 226-229 (1991) (discussing various interpretations and concluding that Article 1F(c)'s application should be limited to government officials "who have exploited their political authority to jeopardize the well-being of individuals").

(1984) (reiterating the "firm and obviously sound" clear statement principle and noting that "[l]egislative silence is not sufficient to abrogate a treaty" (citing *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982))); *Cook* v. *United States*, 288 U.S. 102, 120 (1933) (a treaty will not be considered "abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed"); *Restatement (Third) of the Foreign Relations Law of the United State* § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *cf. Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

The Refugee Act contains no clear statement abrogating the Protocol or purporting to depart from it. On the contrary, as discussed, Congress repeatedly stated its intent to legislate in conformity with the Protocol. And none of the subsequent amendments to the INA's asylum and withholding of removal provisions contains any clear statement suggesting that the persecutor bars are to be interpreted contrary to U.S. obligations under the Protocol.[8]

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[8] The only subsequent legislation involving the persecutor bars was a 1996 revision that rearranged and amended the asylum and withholding provisions but did not materially alter the language of the persecutor bars. *See* Pub. L. No. 104-208, tit. 6, § 305(a)(3), 110 Stat. 3009, 3009-602 (1996) (adding 8 U.S.C. § 231(b)(3)(A)) (varying the persecutor bar's language from "on account of" to "because of" as part of a broader rewrite of the withholding provision); *id.* § 604(a), 110 Stat. at 3009-691 (adding

Accordingly, in construing the persecutor bars in the INA, this Court should give strong interpretive weight to the *nonrefoulement* principle and the limited exceptions thereto in the Refugee Convention and Protocol. As the following section demonstrates, those provisions warrant reversal of the court of appeals' judgment in this case.

C. The Refugee Convention And Protocol Require The United States To Consider Individual Culpability In Applying A Persecutor Bar

The text, purpose, and history of the Convention, as well as its interpretation by other States Parties, demonstrate that conduct performed under duress that is therefore not culpable—even though potentially describable as "persecution" in terms of its effect on a victim—is not a basis for denying an applicant the benefit of *nonrefoulement*.

Interpretation of an international treaty, like that of a statute, begins with the words used, which are given their "ordinary meaning as understood in the public law of nations." *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (internal quotation marks omitted). The Court may also "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943); *see also* Vienna Convention on the Law of Treaties art. 31(1), 1155 U.N.T.S. 331 (1969) (treaty terms "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the

---

8 U.S.C. § 1158(b)(2)(A)) (matching the Refugee Act language in a redraft of the asylum provision).

treaty in their context and in the light of its object and purpose"); *id.* art. 31(3)(b) (permitting recourse to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 325.

This Court has noted the importance of court decisions of other States Parties in interpreting a treaty. *See Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (finding the "'opinions of our sister signatories to be entitled to considerable weight'" (quoting *Benjamins* v. *British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978))); *see also El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 173-176 (1999) (citing case law of other signatory countries in construing Warsaw Convention); *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223, 227-228 (1996) (same); *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 536-537 (1995) (declining to interpret a statute in a manner contrary to the practice of other countries under an international convention); *cf. Olympic Airways* v. *Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) ("We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties.").

All of the relevant interpretive sources demonstrate that Article 1F of the Refugee Convention only allows denial of *nonrefoulement* protection when the applicant engages in persecutory conduct with *culpable intent*, not when the conduct is coerced.

1. The text of Article 1F and its context in the Convention demonstrate the relevance of culpability

Article 1F's terms make clear that its persecutor bar includes consideration of culpability and defenses thereto. The exclusions of Article 1F all refer to "crime" or "guilt," concepts that necessarily include some form of culpable conduct or mens rea. Refugee Convention art. 1F(a) ("committed a crime against peace, a war crime, or a crime against humanity"); *id.* art. 1F(b) ("committed a serious non-political crime outside the country of refuge prior to his admission"); *id.* art. 1F(c) ("guilty of acts contrary to the purposes and principles of the United Nations"). Article 1F thus centers not solely on the objective effect of the conduct specified, but also evokes criminal law principles that implicate individual culpability for wrongful acts, as well as defenses to such culpability. *See supra* pp. 8-11 (citing cases).

Other articles in the Convention demonstrate that its drafters knew how to specify when the objective effect of conduct or circumstances would be determinative, regardless of intent or culpability. Articles 1D (pertaining to persons already receiving protection) and 1E (pertaining to persons firmly resettled in a third country) center on objective circumstances, without addressing the individual's fault or faultlessness in bringing about those circumstances. Article 33(2), which permits expulsion of a refugee "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is," similarly focuses on objective effects: it does not require culpability for acts harming national security, but simply a threat posed.

The context and purpose of the Convention and Protocol confirm the relevance of culpability. The Refugee Convention arose from the United Nations' "profound concern for refugees and endeavour[] to assure refugees the widest possible exercise of the[ir] fundamental rights and freedoms." Convention, pmbl. The Convention's purpose is to establish an international protection regime ensuring the security, legal protection, and human dignity of individuals victimized by persecution. *See* Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations; a Commentary* 6-8 (1953); Hathaway, *The Rights of Refugees Under International Law* 4-5 (2005). The purpose and context of the Convention indicate that exceptions to its protections—and especially exceptions to the protection of *nonrefoulement*—should be construed narrowly. *See* Gilbert, *Current Issues in the Application of the Exclusion Clauses, in Refugee Protection in International Law* 427-429 (Feller *et al.*, eds., 2003); *cf. City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725, 731-732 (1995) (exceptions to the general policy and purpose of a statute should be narrowly construed); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953) (a remedial law "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results").

Narrow construction of exceptions to *nonrefoulement* is particularly justified given the inherently grave consequences if an otherwise-qualified individual is forced back to a country where he or she faces severe harm or death. This Court's general rule resolving any ambiguity in deportation provisions in favor of the noncitizen should apply with special force when the result of deportation will be persecution. *See Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948) ("because deportation is

a drastic measure," deportation provisions are strictly construed in favor of the noncitizen).

The drafting history confirms Article 1F's focus on excluding *culpable* individuals, namely criminals whose conduct subjected them to extradition or international criminal proceedings and whose unworthiness would weaken public support for the refugee regime. *See* Gilbert, *Current Issues in the Application of the Exclusion Clauses* 427-429; Hathaway, *The Law of Refugee Status* 214-215. None of these concerns is served by excluding persons who are not criminally culpable.[9]

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[9] In prior briefing, the Government noted that the Convention adopted the definition of "refugee" found in the 1946 Constitution of the International Refugee Organization, which was also referenced by the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009. Br. in Opp. 8-9 (citing *Cardoza-Fonseca*, 480 U.S. at 437-438 & n.20). This observation, though accurate, is irrelevant. The operative Convention provision here is not the general rule governing qualification as a "refugee"—which in several respects paralleled the IRO definition—but rather the limited exceptions to the Convention's application in Article 1F. Those exceptions were the subject of significant independent negotiation during the drafting of the Convention. *See* Hathaway, *The Law of Refugee Status* 214-216, 221-224, 226-229; Goodwin-Gill & McAdam, *The Refugee in International Law* 163-165, 172-173, 184. Accordingly, nothing in the Displaced Persons Act—or this Court's interpretation of it in *Fedorenko*, 449 U.S. 490—bears on the provisions of the Refugee Convention and Protocol at issue here.

Moreover, *Fedorenko* raised no questions of compatibility with a treaty obligation. Here, since Congress has not clearly stated any intent to deviate from the United States' *nonrefoulement* obligation under the Protocol—and indeed has repeatedly stated an intent to comply with it—the Court's well-established approach (*see supra* pp. 18-19) compels a conforming interpretation of the Refugee Act, namely one that takes account of personal culpability.

2. Decisions of other States Parties recognize that coerced conduct does not exclude an applicant under Article 1F

Courts of other States Parties that have considered the issue have recognized that duress provides a defense to disqualification under Article 1F. Indeed, *amici* are unaware of any decision by another State Party that has held (as the BIA and court of appeals did here) that the objective effect of an asylum seeker's conduct was dispositive without regard to personal culpability for the acts in question.

On facts similar to the instant case, the Federal Court of Canada found that an Eritrean citizen conscripted into the Ethiopian army was not subject to exclusion for helping to round up civilians who were later tortured and executed. The Court found Article 1F inapplicable because:

> —the respondent was forcibly recruited into the Ethiopian Army;
>
> —he held no rank other than a mere soldier;
>
> —he did not have any opportunity to leave the army until he was released in late 1988, early 1989;
>
> —he was compelled to do the duties that he was told to do, namely stand guard on people who were being arrested [and whom the applicant knew would later be tortured and/or killed] after having weapons found in their house, and also burying dead bodies;
>
> —a soldier in a similar situation had tried to escape and had been killed;

> —the respondent's evidence and the documentary evidence showed that if the respondent tried to desert, he would have faced severe punishment, including death;
>
> —the respondent left at the first available moment that he could, namely upon his release after serving two years.

Canada v. *Asghedom*, [2001] F.C.T. 972 ¶ 27 (Can. Fed. Ct.). The court held that "the defence of duress and the circumstances of the case can lead to a conclusion that [the alien] is not excluded [under Article 1F(a)] even if he had knowledge of the crimes perpetrated by the army." *Id.* ¶ 28; *see also Ramirez* v. *Minster of Employment & Immigr.*, [1992] 2 F.C. 306, 328 (Can. Fed. Ct. App.) (defense of duress can justify commission of Article 1F(a) crimes, provided the harm avoided by the applicant is greater than the harm actually inflicted on the victim); *Re V.(C.I.)*, [1991] C.R.D.D. No. 461 (Can. Convention Refugee Determination Div.) (holding Article 1F(a) inapplicable to an alien who had committed "murder and torture" on "more than four occasions" because "he was forced by repeated torture and physical harm that he experienced to commit acts that he believed to be wrong and contrary to human dignity" and was "not to be held responsible for his actions").

Decisions in other countries likewise limit the Article 1F(a) bar to culpable conduct. *See, e.g.*, *SRYYY* v. *Minister for Immigr. & Multicultural & Indigenous Affairs* (2005) 147 F.C.R. 1, 35-36 (Austl. Fed. Ct.) ("Article 1F(a) refers to serious reasons for considering that the relevant person 'has committed a crime.' We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve

that person from criminal responsibility."); *Re W97/164 & Minister for Immigr. & Multicultural Affairs* (1998) 51 A.L.D. 432 ¶ 79 (Austl. Admin. App. Trib.) (finding Article 1F inapplicable where alien participated in killings committed by others because "[t]o refuse to do so would almost certainly have drawn strong reprisals, perhaps his own death. To this extent, the concept of coercion, or obedience to higher orders, becomes relevant to the applicant's situation."); *Re VA*, No. 2142/94, at 12 (N.Z. Refugee Status App. Auth. Mar. 20, 1997) (holding Article 1F inapplicable because "the degree of compulsion or duress under which the appellant acted was such that the exclusion principles do not apply"); *Gurung* v. *Secretary of State for Home Dep't* [2002] UKIAT 4870 ¶ 110 (U.K. Immigr. App. Trib.) (noting that "the assessment under Art 1F must take into account ... factors such as duress and self-defence against superior orders as well as the availability of a moral choice").[10]

Cases sometimes differ regarding whether to consider duress as an affirmative defense excusing proscribed conduct or as a factor in determining whether the applicant engaged in the conduct with culpable

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[10] Although the United States is not party to the Rome Statute of the International Criminal Court (2187 U.N.T.S. 90, *entered into force* July 1, 2002), other countries adhering to that instrument have looked to it as a codification of pre-existing international jurisprudence on the subject of duress. *See, e.g.*, *SRYYY*, 147 F.C.R. at 35. Article 31(1)(d) of the Rome Statute provides that a person shall not be culpable if the person's conduct is caused "by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person," provided that the person acts "necessarily and reasonably" to avoid the threat and that the person did "not intend to cause a greater harm than the one sought to be avoided."

mens rea. *Compare, e.g., R.* v. *Finta*, [1994] 1 S.C.R. 701, 837-838 (Can.) (holding that duress negated the requisite intent for complicity in war crimes), *with SHCB* v. *Minister for Immigr. & Multicultural & Indigenous Affairs* (2003) 133 F.C.R. 561, 568-569 (Austl. Fed. Ct.) (noting availability of obedience to orders under duress as a defense to exclusion, but finding it waived on appeal); *cf. Dixon*, 548 U.S. at 6-7 ("the duress defense ... may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself"). Ultimately, as an Australian tribunal put it, "[w]hether the conclusion in this case be reached by reference to principles of accessorial liability, or by reference to the defence of coercion, or through a combination of these, the result will be the same." *W97/164*, 51 A.L.D. 432 ¶ 83. Under either theoretical approach, the practical result is the same: duress is an available defense, and the court of appeals erred in holding to the contrary.

3. Article 1F(a) expressly incorporates international criminal law principles recognizing individual culpability and commonly applicable defenses

Any remaining doubt as to Article 1F(a)'s culpability requirements is extinguished by looking to the background against which it was drafted.

Article 1F(a) provides that the "crimes" that trigger disqualification are those "defined in the international instruments drawn up to make provision in respect of such crimes." This language refers in particular to the foundational documents for the trials of war criminals following the Second World War. Indeed, the three crimes listed in Article 1F(a) are the very crimes

enumerated in the Charter of the International Military Tribunal that sat at Nuremberg, Germany. *See* Charter of the International Military Tribunal art. 6, annexed to London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1556. The Convention's drafters understood that the principles enunciated by post-war military tribunals would apply to exclusion decisions under the Convention. *See* Hathaway, *The Law of Refugee Status* 215-217; Goodwin-Gill & McAdam, *The Refugee in International Law* 163-171; 1 1 Grahl-Madsen, *The Status of Refugees in International Law* 273-276 (1966); Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretations* 66-67.

The post-war tribunals recognized the defenses of duress and necessity as negating individual culpability. In its Judgment, the International Military Tribunal held that, although a defendant was not excused merely because he acted under superior orders, orders that amounted to coercion and deprived the defendant of any "moral choice" could excuse otherwise criminal conduct. *See* I Secretariat of the International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* 224 (1947) ("The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.").

U.S. tribunals sitting in post-war Germany likewise recognized duress and necessity defenses. The tribunal in the *Einsatzgruppen* case stated that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns.... No court will punish a man who, with a loaded pistol at his head, is compelled

to pull a lethal lever." IV GPO, Case No. 9, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (1950) ("*Nuernberg Trials*") 480; *see also I.G. Farben*, Case No. 6, VIII *Nuernberg Trials* 1176 (duress "is a complete defense where it is given under such circumstances as to afford the one receiving it of no other moral choice than to comply therewith"); *Krupp*, Case No. 10, IX *Nuernberg Trials* 1443 (recognizing a defense where the "act charged was done to avoid an evil both serious and irreparable" and "the remedy was not disproportioned to the evil"); *id.* at 1438 ("[T]he question is to be determined from the standpoint of the honest belief of the particular accused in question .... The effect of the alleged compulsion is to be determined not by objective but by subjective standards."). The tribunals specified, however, that such a defense was unavailable "where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative." *I.G. Farben*, VIII *Nuernberg Trials* 1179; *see also Flick*, Case No. 5, VI *Nuernberg Trials* 1196-1202.

A subsequent United Nations report derived common principles from exhaustive review of over 1900 military tribunal decisions. *See* XV U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* (1949). The report recognized the availability of duress as a defense where: "(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not disproportionate to the evil." XV *id.* at 174.

The principles articulated by the post-war tribunals were settled international law by the time of the Refu-

gee Convention's drafting and approval. In 1946, the U.N. General Assembly affirmed the principles recognized by the Charter and Judgment of the International Military Tribunal. G.A. Res. 95(I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946). Shortly thereafter, the U.N. International Law Commission (ILC), which reviewed those principles, recognized that a duress defense was well-established. *See Draft Code of Offences Against the Peace and Security of Mankind—Report by J. Spiropoulos, Special Rapporteur*, U.N. Doc A/CN.4/25 at 275 (1950) (noting a duress standard identical to that reported by the U.N. War Crimes Commission). The Convention's history shows that its drafters wrote Article 1F with significant regard for the ILC's ongoing work. *See* 1 Grahl-Madsen, *The Status of Refugees in International Law* 276; Hathaway, *The Law of Refugee Status* 217; Robinson, *Convention Relating to the Status of Refugees* 66-67.

Those who drafted and signed the Refugee Convention were well aware of the importance of a duress defense, even in prosecutions for the most serious crimes. Neither the Convention, nor the Refugee Act that Congress patterned on it, sought to undo that defense. Rather, Convention and Act alike ensure that persons need not suffer return to serious danger solely because they were forced—through credible threats to their own life or safety—to mistreat others.

II. The Case Should Be Remanded For The BIA To Determine Whether There Is Sufficient Evidence Of Culpable Conduct

The statute is clear that the persecutor bars allow return to persecution only if the applicant's own participation in "persecution" was culpable. Although the BIA is afforded deference in its administration of the

INA (*see Aguirre-Aguirre*, 526 U.S. at 424-425), this Court may overrule its action "if we conclude that it is inconsistent with the purposes of the [treaty] or with domestic law." *TWA*, 466 U.S. at 254 n.26. Put differently, the BIA may not abrogate U.S. treaty obligations or construe the persecutor bars contrary to Congress's clear intent. As detailed above, the BIA's decision in this case (affirmed by the court of appeals) did both.

The Court granted certiorari to determine whether a persecutor bar "prohibits granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution." Pet. i. The answer to that narrow legal question is no. That question, however, is "quite different from the question of interpretation that arises in each case in which the agency is required to apply" a persecutor bar to a given set of facts. *Cardoza-Fonseca*, 480 U.S. at 448. Although culpability is an unquestionable requirement of the persecutor bars, the task of articulating the particular standards under which that requirement is to be considered is a matter best left to the agency in the first instance, as is their application to the facts of the instant case. *See id.*

At the very least, however, the Convention and Protocol (and therefore the INA) require the persecutor bars to be applied in conformity with the well-established standards prevailing at the time the Convention was concluded—the standards understood by the drafters and the Contracting States. Accordingly, an applicant may not be held ineligible for relief where "(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no adequate means of escape; (c) the remedy was not dis-

proportionate to the evil." XV U.N. War Crimes Comm'n, *Law Reports of Trials of War Criminals* 174. Of course, it would be open to the BIA on remand to interpret the INA and the Protocol more favorably to an applicant, but the foregoing interpretation—compelled by the Convention's text, drafting history, state practice, and international criminal law antecedents—is the minimum standard required. That is a sufficient basis to reverse the court of appeals' judgment in this case, which did not permit consideration of culpability at all.

Accordingly, the Court should remand this case with instructions that the BIA consider the Petitioner's individual culpability under a legal standard consistent with U.S. obligations under the Refugee Protocol.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 2008

AMICUS CURIAE BRIEF

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(8)

No. 07-499

FILED

JUN 23 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

v.

MICHAEL MUKASEY,
United States Attorney General,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Office of the United Nations High Commissioner for Refugees ("UNHCR") has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to their problems. *See* Statute of the Office of U.N. High Comm'r for Refugees, G.A. Res. 428 (V), Annex, U.N. Doc. A/RES/428(V), ¶¶ 1, 6 (1950). In particular, the Statute of the Office of the High Commissioner specifies that the High Commissioner's duty to provide protection for refugees includes supervising the application of international conventions for the protection of refugees. *Id.* ¶ 8(a) (1950). UNHCR's supervisory responsibility is formally recognized in the 1951 Convention relating to the Status of Refugees, art. 35, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 ("1951 Convention" or "Convention"), and in the 1967 Protocol relating to the Status of Refugees, art. II, Jan. 31, 1967, 19 U.S.T. 6223, 606

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

U.N.T.S. 267 ("1967 Protocol" or "Protocol"), to which the United States became a party in 1968.[2]

The views of UNHCR are informed by more than fifty years of experience supervising the Convention and Protocol. UNHCR, with a presence in 110 countries and currently serving over thirty-two million people, provides guidance to States in establishing and implementing national procedures for refugee status determinations and conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the Convention and Protocol are integral to the global regime for the protection of refugees. The Convention and Protocol serve as the foundation of United States asylum law; thus, UNHCR's understanding of these treaties should provide substantial guidance to this Court in applying United States asylum law.[3]

This case concerns the application of the grounds for excluding an individual from refugee protection under United States law. These provisions correspond to the exclusion clauses under Article 1F of the 1951

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[2] Art. I of the 1967 Protocol incorporates by reference Articles 2-34, the substantive provisions of the 1951 Convention.

[3] This Court has consistently granted UNHCR leave to submit an *amicus curiae* brief when interpreting provisions of the 1980 Refugee Act, e.g., in *INS v. Stevic*, 467 U.S. 407 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) and *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006), *cert. dismissed*, 128 S. Ct. 828 (2007).

Convention. Failure to fully comply with the criteria for determining whether an individual is, in fact, excludable, also gives rise to a potential violation of the fundamental principle of *non-refoulement* – not returning a refugee to persecution – under Article 33 of the 1951 Convention. As such, this case presents questions squarely within the core mandate of UNHCR.[4] In addition, this Court's ruling will likely influence the manner in which other countries apply similar provisions implementing the treaty.

In furtherance of its core mandate, UNHCR seeks to promote a common approach to the application of the 1951 Convention and 1967 Protocol,[5] including the exclusion clauses, thus providing consistency and predictability in refugee determinations internationally and reducing the possibility of conflict

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[4] UNHCR submits this brief *amicus curiae* to explain the analytic framework for resolving issues related to exclusion from international refugee protection, not to offer an opinion on the merits of the Petitioner's particular claim.

[5] The most recent efforts in this regard were the Global Consultations on International Protection organized by UNHCR in 2000-2002 to address key questions relating to the 1951 Convention. The Consultations enjoyed broad participation by governments, including the government of the United States, the International Association of Refugee Law Judges, legal practitioners, non-governmental organizations and academia. The purpose was to take stock of the state of law and practice, to consolidate the various positions taken based on best practices, and to develop concrete recommendations on how to achieve more consistent global understandings of key issues. The bases for exclusion from refuge protection were among the issues comprehensively addressed in the Global Consultations.

between decisions made by different States, between decisions made by a State and the UNHCR, or both.

SUMMARY OF ARGUMENT

The legal grounds under the Immigration and Nationality Act ("INA") at issue here bar an individual from receiving the protection of asylum and withholding of removal if the individual has been determined to have "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(2)(A)(i) (asylum bar) and 8 U.S.C. § 1231(b)(3)(B)(i) (withholding of removal bar). Congress included this exception to refugee protection to be consistent with the exclusion clause under Article 1F(a) of the 1951 Convention, which provides for the exclusion from refugee status of individuals who have committed a crime against peace, a war crime or a crime against humanity.

Given the grave consequences of excluding a refugee from international protection – return to persecution – the exclusion clauses must be applied restrictively and with the utmost caution. Under international law, in order to exclude someone based on Article 1F, not only must the act in question fall within the exclusion clauses, there must be an assessment of whether the refugee applicant is individually responsible for the excludable conduct. To be

individually responsible, the applicant must have committed the act or made a substantial contribution to its commission. Additionally, there must be a finding that the applicant had the requisite *mens rea* including both intent and knowledge regarding the conduct and its consequences. If such a finding is made, there must be a further examination of whether there are any grounds for rejecting individual responsibility, including any appropriate defenses such as duress.

Without such analysis, refugees may erroneously be denied essential international protection and be subject to *refoulement*, or return to a country where their "life or freedom would be threatened," in violation of United States' obligations under the 1967 Protocol and Article 33 of the 1951 Convention.

In contravention of United States' international obligations, both the Board of Immigration Appeals ("BIA") (Pet. App. at 6a) and the Fifth Circuit Court of Appeals (*id.* at 2a) specifically ruled that whether the Petitioner had been compelled to assist authorities was irrelevant.

ARGUMENT

I. CONGRESS CLEARLY INTENDED THAT THE "PERSECUTOR OF OTHERS" BAR TO ASYLUM AND WITHHOLDING OF REMOVAL BE APPLIED CONSISTENTLY WITH UNITED STATES' OBLIGATIONS UNDER THE 1967 PROTOCOL.

Under the 1980 Refugee Act,[6] an individual who has "ordered, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is barred from receiving asylum[7] or withholding of removal.[8] As will be shown, Congress intended that exclusion from asylum and withholding of removal be applied in a manner consistent with United States' international law obligations under the 1951 Convention and 1967 Protocol. As will also be shown, this Congressional intent is firmly established. Thus, the Convention and Protocol are relevant sources of international refugee law that should guide the Court in applying the "persecutor of others" bar.

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[6] The 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980) is incorporated in the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1102, *et seq.*, and as such will be cited by its location in the U.S. Code and its correlative cite in the INA.

[7] 8 U.S.C. § 1158(b)(2)(A)(i); INA § 208(b)(2)(A)(i).

[8] 8 U.S.C. § 1231(b)(3)(B)(i); INA § 241(b)(3)(B)(i).

When Congress included the "persecutor of others" bar in the 1980 Refugee Act, it legislated against the backdrop of the long-established rule that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, C.J.); *cf The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."). This Court and lower federal courts have reaffirmed the *"Charming Betsy"* presumption on numerous occasions. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *United States v. Suerte*, 291 F.3d 366, 373-74 (5th Cir. 2002).

The text of the INA generally, and the "persecutor of others" bar specifically, evince no intent to violate international law. To the contrary, as this Court reaffirmed in *INS v. Aguirre-Aguirre*, "'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol. . . ." 526 U.S. at 427 (1999) (quoting *INS v. Cardoza-Fonseca,* 480 U.S. at 436-37 (citing H.R. Rep. No. 96-781, at 19 (1980)) (internal citation omitted); *see also* H.R. Rep. No. 96-608, at 9 (1979) (stating Congress' intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and Protocol").

Congress' intention that the Refugee Act comport with the 1967 Protocol was not limited to the definition of "refugee" or eligibility for asylum. Congress specifically expressed its intent that the provisions of the Refugee Act obligating the Attorney General to withhold deportation of a refugee "[conform] to the language of Article 33" of the 1951 Convention. *INS v. Stevic*, 467 U.S. at 421 (discussing 8 U.S.C. § 1253(h) (1976), now codified at 8 U.S.C. § 1231(b)(3)).

It is equally clear that Congress intended the bars to asylum and withholding of removal under United States law to be consistent with exclusion from refugee protection under international law. Indeed, the conferees included these exceptions in the Refugee Act based on their explicit "understanding that [they were] based directly upon the language of the Protocol" and would "be construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 161.

Turning to the specific exclusion provision at issue in the present case – the "persecutor of others" bar – the legislative history demonstrates Congress' clear intent that the bar be consistent with Article 1F(a) of the 1951 Convention, notwithstanding the difference in terminology between the statutory bar and Article 1F(a).[9] In adding "language specifically to

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[9] Article 1F(a) does not specifically refer to persecution of others; however, the crimes which it enumerates – crimes against peace, war crimes, and crimes against humanity – would encompass acts of this nature.

exclude from the definition of 'refugee' those who themselves engaged in persecution," Congress understood such a formulation to be "consistent with the U.N. Convention (which does not apply to those who, *inter alia*, 'committed a crime against peace, a war crime, or a crime against humanity' . . . "). H.R. Rep. No. 96-608, at 10 (1979).

Plainly, Congress intended that the "persecutor of others" bar be construed to comport with United States' obligations under international law. The clear legislative history, coupled with the absence of any statement to the contrary, points to the conclusion that any application of the bar that fails to adhere to United States' obligations under international law is incorrect. This Court should therefore apply the "persecutor of others" bar in light of Congress' express commitment to ensure United States' adherence to international refugee law and in a manner in keeping with its own precedents.

II. PROPER APPLICATION OF THE EXCLUSION CLAUSES REQUIRES THAT AN APPLICANT FOR REFUGEE STATUS BE FOUND INDIVIDUALLY RESPONSIBLE FOR THE CRIMINAL CONDUCT.

Under the 1951 Convention, an individual is excluded from refugee protection only if he or she has committed a crime that falls within the exclusion clauses contained in Article 1F of the Convention. The rationale for these clauses is to exclude any

individual who has committed an act so grave as to be undeserving of international refugee protection. U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 140, U.N. Doc. HCR/IP/4/Eng/REV.1 (1979, re-edited Jan. 1992) ("UNHCR *Handbook*").

In view of the serious possible consequences for the individual – return to persecution, the most extreme sanction under the relevant international refugee instruments – international law requires that the exclusion clauses be applied with the utmost caution and only after a full assessment of the individual circumstances of the case.. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003) ("*Exclusion Guidelines*"); *see also* UNHCR *Handbook* ¶ 149.

Article 1F of the 1951 Convention contains three clauses which exhaustively enumerate the acts that may result in the exclusion of an individual from refugee protection. It provides that the Convention "shall not apply to any person with respect to whom there are serious reasons for considering" that:

> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes or principles of the United Nations.

1951 Convention, Article 1F. A person who participates in what might be classified as "persecution of others" – but otherwise meets the refugee definition – is therefore subject to exclusion from international refugee protection only if the acts committed meet the legal criteria under one or more of the clauses in Article 1F. Those criteria include the requirement that there be a finding that there are serious reasons for considering that the applicant was individually responsible for the act in question.

In analyzing exclusion from refugee status, UNHCR relies on the 1951 Convention and 1967 Protocol, and is guided by its Executive Committee, of which the United States is a long-time member. UNHCR also relies on its own *Exclusion Guidelines* and the accompanying U.N. High Comm'r for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 15 Int'l J. Refugee L. 3 (2003) ("*Background Note*"), which forms an integral part of the Guidelines. These documents were formulated and issued to help ensure a proper understanding of the exclusion clauses in light of contemporary concerns and to provide States with more comprehensive and up-to-date analytical tools

to supplement the discussion of exclusion found in the UNHCR *Handbook*.[10]

The UNHCR *Exclusion Guidelines* and *Background Note on Exclusion* are based on State practice, case law, UNHCR's experience, the *travaux préparatoires* of the relevant international instruments, and the opinions of expert commentators. *Background Note* ¶ 2. The *Exclusion Guidelines* and the *Background Note* inform our analysis of the issue before this Court, which focuses on the requirement to assess individual responsibility for excludable acts, and, in particular, on the need for considering the grounds for rejecting such responsibility based on the defense of duress.

Because the Article 1F exclusion clauses are based on criminal violations, principles of criminal

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[10] UNHCR issued its *Handbook* in 1979 at the request of its Executive Committee to provide States with guidance on the application and interpretation of the 1951 Convention and its 1967 Protocol. This Court has found that, while not legally binding, the UNHCR Handbook may be a "useful interpretive aid", *see INS v. Aguirre-Aguirre*, 526 U.S. at 427, and provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein, *see Cardoza-Fonseca*, 480 U.S. at 439 n.22. *See also Rodriguez-Roman v. INS*, 98 F.3d 416, 425 (9th Cir. 1996) (noting the BIA "is bound to consider the principles for implementing the Protocol established by" UNHCR); *In re S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that in adjudicating asylum cases the BIA must be mindful of "the fundamental humanitarian concerns of asylum law," and referencing the UNHCR Handbook).

law are applicable in assessing whether a refugee is excludable based on one of its grounds. In accordance with fundamental principles of criminal law, exclusion from international refugee protection under Article 1F requires a determination of "individual responsibility" before any of the delineated grounds can be found to be applicable. *Exclusion Guidelines* ¶ 18.

"In general, individual responsibility flows from the person having committed, or made a substantial contribution to the commission of a criminal act, in the knowledge that his or her act or omission would facilitate the criminal conduct." *Background Note* ¶ 51. *See also Exclusion Guidelines* ¶ 18. "The individual need not physically have committed the criminal act in question. Instigating, aiding and abetting and participating in a joint criminal enterprise can suffice." *Exclusion Guidelines* ¶ 18. The person's degree of involvement must be carefully analyzed in each case. *Background Note* ¶ 51. Even, and perhaps especially, when "acts of an abhorrent and outrageous nature have taken place," it is important to focus on the role and responsibility of the individual. *Id.*

For a finding of individual criminal responsibility under Article 1F, it must be established that the applicant committed the material elements of the offense with "intent" and "knowledge" regarding the conduct and its consequences. *Exclusion Guidelines* ¶ 21. The UNHCR *Background Note* discusses "intent" as requiring that the person meant to engage in the conduct at issue or to bring about a particular

consequence, or was aware that the consequence would occur in the ordinary course of events. ¶ 64. Addressing the meaning of "knowledge," the *Background Note* defines it as an awareness that certain circumstances exist or that a consequence would occur in the ordinary course of events. *Id.* When the person concerned did not have the *mens rea* required for a particular offense,[11] a fundamental aspect of the criminal offense is missing, and, therefore, no individual responsibility arises for the crime in question.[12] *Id.* If, on the other hand, it is determined that the individual is responsible, further examination must be undertaken to determine whether any defenses to the conduct in question are applicable.

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[11] The requisite *mens rea* will not be present if the person lacks the mental capacity due to such reasons as insanity, mental handicap, involuntary intoxication or, in the case of children, immaturity. *Background Note* ¶ 65.

[12] Specific considerations apply to crimes against peace which must be "committed in the context of the planning or waging of aggressive wars or armed conflicts. Armed conflicts are only waged by States or State-like entities, [thus,] traditionally, personal liability under this provision can only attach to individuals in a position of high authority representing a State or State-like entity." *Background Note* ¶ 50. This limitation does not apply to "war crimes, crimes against humanity and serious non-political crimes." *Id.*

III. INDIVIDUAL RESPONSIBILITY CANNOT BE ESTABLISHED IF ANY DEFENSES TO CRIMINAL LIABILITY SUCH AS DURESS ARE APPLICABLE.

Individual responsibility is not established if any defenses to criminal responsibility apply. *Exclusion Guidelines* ¶ 22; *Background Note* ¶ 66. The defense most relevant to the issue before the Court is that of duress.

The defense of duress applies where the act in question "results from the person concerned necessarily and reasonably avoiding a threat of imminent death, or of continuing or imminent serious bodily harm to him- or herself or another person, and the person does not intend to cause greater harm than the one sought to be avoided." *Exclusion Guidelines* ¶ 22; *Background Note* ¶ 69.

State practice recognizes the availability of the defense of duress in cases implicating Article 1F. For example, recently in a case strikingly similar to Petitioner's, the Federal Court of Canada upheld the Immigration and Refugee Board's ("IRB") decision that an Eritrean who was forcibly recruited into the Ethiopian military and forced to stand guard while civilian homes were raided for ammunition and weaponry and to assist in the transport of people to a camp where he was aware they would be tortured did not fall under the exclusion clauses of the Convention because he acted under duress. *Minister of Citizenship & Immigration v. Asghedom*, [2001] F.C. 972,

(Can.). In that case, the IRB found that the refugee applicant had knowledge of acts which were deemed to constitute crimes against humanity and war crimes implicating Article 1F(a) but that he had established the defense of duress and, therefore, was not complicit in those crimes. *Id.* ¶ 20. The IRB based this conclusion on the following facts:

> – the respondent was forcibly recruited into the Ethiopian Army;
>
> – he held no rank other than a mere soldier;
>
> – he did not have any opportunity to leave the army until he was released in late 1988, early 1989;
>
> – he was compelled to do the duties that he was told to do, namely stand guard on people who were being arrested after having weapons found in their house, and also burying dead bodies;
>
> – a soldier in a similar situation had tried to escape and had been killed;
>
> – the respondent's evidence and the documentary evidence showed that if the respondent tried to desert, he would have faced severe punishment, including death;
>
> – the respondent left at the first available moment that he could, namely upon his release after serving two years.

Id. ¶ 22.

Other recent cases from common law jurisdictions have also recognized that the duress defense is available to negate a finding of individual responsibility under the Convention's exclusion clauses. *See, e.g.*, *Sryyy v. Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 220 A.L.R. 394 (Austl.) (Federal Court of Australia stating, "Article 1F(a) refers to serious reasons for considering that the relevant person 'has committed a crime.' We are unable to accept the proposition that a person may be said to have committed a crime when that person has a defence which, if upheld, will absolve or relieve that person from criminal responsibility."); *Gurung v. Secretary of State for the Home Department* [2003] EWCA (Civ) 654, [1]-[15] (Eng.) (The United Kingdom Immigration Appeal Tribunal finding that even when a refugee applicant is complicit in an act giving rise to exclusion, an Article 1F assessment must take into account defenses including duress); Refugee Appeal No. 2142/94 VA, N.Z. Refugee Status Appeals Authority (Mar. 20, 1997) (The New Zealand Refugee Status Appeals Authority applying the rule that when an individual's conduct falls under Article 1F, he or she may not be excludable if there is a significant degree of compulsion or duress surrounding the conduct).

The defense of duress is often at issue in the context of forcibly conscripted soldiers. "When duress is pleaded by an individual who acted on the command of other persons in an organization," such as in the instant case, "consideration should be given as to whether the individual could reasonably have been

expected simply to renounce his or her membership, and indeed whether he or she should have done so earlier if it was clear that the situation in question would arise. Each case should be considered on its own facts." *Id.* Especially in forced conscription cases, "the consequences of desertion plus the foreseeability of being put under pressure to commit certain acts are relevant factors." *Background Note* ¶ 70.

The text itself, as well as the legislative history of the relevant statutory provisions, demonstrate Congress' clear intent that the "persecutor of others" bar is to be construed consistently with United States' international obligations. The determination by the Fifth Circuit Court of Appeals that when applying the "persecutor of others" bar it is irrelevant to consider whether an individual was "compelled to assist authorities" fails to comport with these obligations.[13]

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[13] In coming to this conclusion, the Fifth Circuit relied upon *Fedorenko v. United States*, 449 U.S. 490 (1981). It is beyond the scope of this brief to analyze the applicability of this Court's decision in *Fedorenko* to the "persecutor of others" bar under United States law. However, we note that the definition of "displaced persons," including certain enumerated exclusion grounds, which was at issue in *Fedorenko*, should not be treated as equivalent to the definition of "refugee" and the exclusionary clauses of Article 1F in the 1951 Convention. The definition of "displaced persons" stemmed from the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), which adopted this definition from that of "refugees or displaced persons" contained in the Constitution of the International Refugee Organization ("IRO") Annex I, Aug. 20, 1948, 62 Stat. 3037-3055, T.I.A.S. No. 1846, which is not applicable here.

Because an individual found to have engaged in the persecution of others would be barred from withholding of removal, the United States' equivalent of protection against *refoulement*, it is even more crucial that this bar be applied in strict compliance with Article 1F. An erroneous application of the "persecutor of others" bar could lead not only to a genuine refugee being deemed undeserving of international protection but to *refoulement* in violation of the core principle of United States' obligations under the Protocol and Article 33 of the 1951 Convention.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to reverse the judgment of the court of appeals, to hold that duress is available as a defense to the "persecutor of others" bar to asylum and withholding of removal, and to remand to the agency to articulate the standard for duress and how that standard would apply in Petitioner's case.

Respectfully submitted,

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June 23, 2008